REPORT NUMBER 6



# *Legislative Council Report on the Montana Constitution*

MONTANA CONSTITUTIONAL CONVENTION

1971-1972

# LEGISLATIVE COUNCIL REPORT ON THE MONTANA CONSTITUTION

CONSTITUTIONAL CONVENTION OCCASIONAL PAPER NO. 6

PREPARED BY

MONTANA CONSTITUTIONAL CONVENTION COMMISSION

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# PREFACE

The delegates to the 1971-1972 Montana Constitutional Convention will need historical, legal and comparative information about the Montana Constitution. Recognizing this need, the 1971 Legislative Assembly created the Constitutional Convention Commission and directed it to assemble and prepare essential information for the Convention.

To fulfill this responsibility, the Constitutional Convention Commission is preparing a series of research reports under the general title of Constitutional Convention Studies. In addition to the series of research reports the Commission has authorized the reprinting of certain documents for the use of Convention delegates.

The document herein republished is the 1968 Montana Legislative Council report on the Montana Constitution. The study originally was published as report No. 25 of the Legislative Council in October, 1968, and the original printing is exhausted.

The report, a section by section analysis of the Montana Constitution, was prepared by a Legislative Council subcommittee consisting of Senators Jean A. Turnage, Chairman; William A. Groff and John L. McKeon and Representatives James T. Harrison, Jr.; James R. Felt; C. R. Fischer; Lawrence G. Stimatz and Jerry B. Wallander.

The study concluded that more than 50 percent of the Montana Constitution is inadequate for today's needs. Acting on the report, the 1969 Legislative Assembly created the Montana Constitution Revision Commission and placed Referendum 67 to call a constitutional convention on the November, 1970 General Election ballot.

This reprinting of the Legislative Council study is respectfully submitted to the people of Montana and their delegates to the 1971-1972 Constitutional Convention.

ALEXANDER BLEWETT

CHAIRMAN

*This study has led to the general conclusion that there is need for substantial revision and improvement in the Montana constitution. Provisions which invite subterfuge, provisions which are archaic, provisions which are ambiguous, provisions which are statutory, and provisions which place serious limitations on effective state government were found throughout the Montana constitution. The changes needed in the Montana constitution cannot be accomplished adequately through the present amendment process. This process encourages "nitpicking" and at the same time avoids confrontation with the basic problems of reform and change.*

Montana Legislative Council
Report on the Montana Constitution

# THE MONTANA CONSTITUTION

A REPORT TO THE FORTY-FIRST
LEGISLATIVE ASSEMBLY

by the

MONTANA LEGISLATIVE COUNCIL

October 1968

To Members of the Forty-First Legislative Assembly:

Without substantial revision in the 1889 Constitution, the state of Montana will find it increasingly difficult to meet the urgent needs of a dynamic social order. The state cannot meet its responsibilities within our federal system unless its basic legal framework–the Constitution–permits response to problems as they arise. The Montana Constitution of 1889 is not adequate as a framework to meet present and future problems. Less than one-half of the document is considered adequate in its present form, and improvements could be made in many of the sections now considered adequate. More than one-half of the present document should be revised substantially or repealed.

The Council believes that the most feasible means of resolving deficiencies in the document is through a Constitution Revision Commission as recommended in this report. Deficiencies in the present document cannot be accomplished through the piecemeal amendment process of the past. While encouraging "nitpicking," the piecemeal amendment process avoids confrontation with the basic problems of reform and change. If the recommendations of this report are accepted by the Legislative Assembly, Montana will have taken a significant step toward improvement of government at all levels.

Respectfully submitted,

SENATOR DAVID F. JAMES
Chairman
Montana Legislative Council

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* Replaced Representative Jack R. McNamara who resigned to accept appointment to a federal position.

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HOUSE RESOLUTION NO. 17*

Introduced by Murphy, Felt, Willits, Harrison, Dougherty

SENATE RESOLUTION NO. 22*

Introduced by Groff, Mackay, James

A RESOLUTION OF THE HOUSE OF REPRESENTATIVES (SENATE) OF THE STATE OF MONTANA REQUESTING THE LEGISLATIVE COUNCIL TO CONDUCT A STUDY TO DETERMINE WHETHER OR NOT THE PRESENT CONSTITUTION OF MONTANA IS ADEQUATELY SERVING THE NEEDS OF THE PEOPLE OF THIS STATE; AND TO REPORT ITS FINDINGS TO THE FORTY-FIRST LEGISLATIVE ASSEMBLY.

WHEREAS, the constitution of Montana has been in effect for more than three-quarters of a century; and

WHEREAS, the conditions of life have changed greatly since the adoption of the present constitution; and

WHEREAS, its length and detail require increasingly frequent amendments to adapt it to modern conditions; and

WHEREAS, the growth of population, industry, and resource development that has occurred and will continue to occur in this state create problems for government which are difficult to resolve under the present constitution; and

WHEREAS, in order for state government to preserve its historic position in our federal system, its basic legal tool must be adequate to the task; and

WHEREAS, any comprehensive constitutional revision is a long and arduous task which should not be entered into lightly; and

WHEREAS, constitutional revision requires careful and impartial research to evaluate the present provisions in terms of the needs of today as well as of tomorrow; and

WHEREAS, the inauguration of constitutional amendments or revison is a legislative function which cannot be relinquished under the requirements of the present constitution; and

WHEREAS, the Legislative Council is a creature of the Legislative Assembly of the state of Montana.

*Identical simple resolutions.

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES (SENATE) OF THE STATE OF MONTANA:

That the Legislative Council is requested to study the present constitution of Montana to determine if it is adequately serving the current needs of the people, examine the alternative methods of change by extensive amendments or a complete revision by constitutional convention, and report its findings to the Forty-First Legislative Assembly.

BE IT FURTHER RESOLVED, that the Legislative Council consider the provisions of other states' constitutions, expecially those which have in recent years adopted new ones.

BE IT FURTHER RESOLVED, that the Legislative Council may appoint, as it deems necessary, legislators, lay citizens, and legal experts to study committees to aid in this study.

BE IT FURTHER RESOLVED, that the Chief Clerk of the House (Secretary of the Senate) is directed to send a copy of this resolution to the Executive Director of the Legislative Council.

## INTRODUCTION

House Resolution No. 17 and Senate Resolution No. 22 of the 1967 Legislative Assembly asked the Legislative Council to study the present Constitution of Montana to determine if it is adequately serving the current needs of the people. The resolutions also asked the Council to examine the alternative methods of change by extensive amendments or by a complete revision through a constitutional convention, and report its findings to the Forty-First Legislative Assembly.

The identical resolutions noted that: (1) the constitution has been in effect for more than three-quarters of a century; (2) conditions have changed greatly since the constitution was adopted; (3) the length and detail of the Montana constitution require increasingly frequent amendment to adapt it to modern conditions; (4) the growth of population, industry, and resource development that has occurred, and will continue to occur, create problems for government that are difficult to resolve under the present constitution; and (5) if state government is to preserve its historic position in our federal system, its basic legal tool must be adequate to the task. The resolutions also observed that any comprehensive constitutional revision is a long and arduous task that should not be entered into lightly.

The Council wishes to thank a number of persons who assisted in this study. These include Professor David R. Mason and Associate Professor William F. Crowley of the University of Montana Law School and Judge Jack Greene of the Fourth Judicial District who met with the Council to discuss the judicial article. Particular thanks are due Dr. Ellis Waldron of the University of Montana who acted as counsultant to the Council throughout the study.

# Chapter I
# STATE CONSTITUTIONS

## General[1]

It is difficult, if not virtually impossible, to formulate easy generalizations on state constitutions. State constitutions vary in age, length, content, and general effectiveness. The shortest state constitution (an estimated 7,600 words) is also one of the oldest having been adopted by Vermont in 1793. Louisiana's constitution (an estimated 253,830 words) is the longest, and that state has adopted a new constitution more often than any other state—ten times.

In terms of length the Montana constitution, with an estimated 28,000 words, compares closely with constitutions of Delaware, Idaho, Illinois, Kentucky, Michigan, Mississippi, Nebraska, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, West Virginia, Washington, and Wyoming. Fifteen states have constitutions that are less than 20,000 words in length, and only six states have documents of 50,000 words or more. It has been observed that the briefest, and in many respects the best, state constitutions tend to be either the oldest or the latest. The constitutions which date from the Victorian period have been described as "like the mansions of this time—massive, rambling and adorned with gingerbread."[2]

It is difficult to discern any direct correlation between the length of a constitution and the number of times it has been amended. Through 1966, fifty amendments to the Montana constitution had been submitted to the voters and thirty-six of these were adopted. One of the thirty-six amendments adopted, however, was voided by the Supreme Court after its approval at the 1892 general election because the Secretary of State had not published the amendment for three months prior to the election.[3] Four additional amendments were passed by the Legislative Assembly, but they were not submitted to the electorate. In 1933, an injunction prohibited publication of a new section providing for a state budget, and in 1959 three proposed amendments were withheld from the ballot after the Supreme Court had held one unconstitutional and the Attorney General advised that the other two proposed amendments came squarely within that decision.[4] The amendment in question was declared unconstitutional because it was not submitted to the Governor for his approval prior to being filed with the Secretary of State.

## The History of State Constitutions[5]

In early days, when sovereignty was transferred from the crown to the people, the people promptly vested most of the power in their representatives, the legislators. The executive was highly suspect, for governors had been the king's agents. The division of powers in many of the older states was only nominal, however, with the legislature electing both governor and judicial officers.

The structure of state government gradually changed and the division of powers became more real. In the early 1800's a broadened electorate took a more active role, electing the governor and frequently other executive officers.

Legislatures nevertheless retained their supremacy. Unfortunately they often did not merit the trust put in them by the citizenry. The latter part of the nineteenth century was an era of tremendous expansion; great demands accordingly were being made for new state services. Two forces, the corporation and the political boss, applied unparalled pressures on legislatures that did not have the caliber nor often the will to resist. Because the legislatures failed them, the people began to call for more direct control of government. A pattern emerged wherein there were sealed into the constitution cures for current difficulties, with the purpose of limiting legislative action.

1. For additional comparative data on state constitutions, see Robert B. Dishman, *State Constitutions: The Shape of the Document*, (New York: National Municipal League, 1960) and The Council of State Governments, *Book of the States 1968-69*, (Chicago: The Council of State Governments), 1966.
2. *State Constitutions: The Shape of the Document*, p. 1.
3. *State ex. rel. Woods v. Tooker, 15 Mont. 9.*
4. *Livingstone v. Murray, 137 Mont. 557.*
5. This statement on the history of state constitutions is taken verbatim from Charlotte Irvine and Edward M. Kresky, *How to Study a State Constitution* (New York: National Municipal League, 1962), pp. 3-5

Constitutional conventions of that era vigorously restricted all branches of government and incorporated a variety of highly specific limitations and regulations into the documents they framed. The people approved the innovations as admirably democratic, overlooking the fact that in the amendments they were dissipating responsible, effective government.

Changes were submitted of necessity. For one thing, the problems themselves were not static. Detailed prescriptions regulating corporations, or taxes, or the court system, or any other important issue, dealt with the situation of the hour and began to reveal inadequacies as soon as that hour had passed. As time went on, amendment was piled on amendment in a race to keep the constitution abreast of each new set of circumstances.

Further, it developed that positive commandments and grants of power to the legislature had the effect of prohibiting whatever was not explicitly authorized. In state constitutions silence gives consent, words restrict. If a constitution stipulated that the state should provide for orphans aged one to eight, the courts would find that the state could not provide for nine-year old orphans. An amendment to cover orphans of all ages could well require another to cover half-orphans and still another to authorize aid to children whose parents were both living. Detail bred detail. When California constitutionally exempted church property used for worship from the property tax, an amendment became necessary to exempt churches in process of construction and to exempt adjacent parking lots. A final amendment exempted nonadjacent parking lots and, to make an end of voting on the subject, added "until the legislature shall otherwise provide by law."

Paradoxically, constitutions also grew more restrictive because restrictions had not proved effective. In an effort to plug loopholes and put an end to official wickedness, more and more verbiage was added from which new crops of amendments traced their origin. Meanwhile, private interests were availing themselves of the constitution as a safety vault in which to deposit laws favorable to their own health and welfare.

Yet legislators could not be held to account for matters over which they had no control, nor were governors answerable for the acts of the growing bevy of independent boards and executive officials. "Hog-tied, drawn and quartered," observes Professor James W. Fesler, "many a state government was no government at all."

It was time to try a new tack. To rout the political bosses and behind them the "interests" who had filled the power vacuum in government halls, reform groups in the early twentieth century threw their weight behind the direct primary and other election and administrative improvements. In the younger states the initiative, referendum and recall secured for the electorate new means of control. Executive reorganization strengthened the governor's authority. Fear of the legislature began to abate and twentieth century needs for government action in new areas–workmen's protections, public assistance, health and housing, for example–set the stage for change.

At this point, fear of the judiciary entered the constitutional picture. Both federal and state supreme courts were declaring unconstitutional provisions which appeared in response to new social needs. Accordingly, new constitutional provisions appeared, either to override adverse court decisions or to "constitutionalize" new programs.

By the end of the 1930's the attitude of the courts had altered but the constitutional consequences remain. In New York an article on housing has, in 22 years, necessitated five amendments, not to define state policy but to implement it. Even so, a study of this article noted that:

> The detailed nature of the constitutional provisions has unquestionably impeded legislative freedom and has limited administrative ingenuity in suggesting new approaches and techniques as the nature of urban planning problems has shifted and as the dimension of the difficulties has changed.

In summary, while almost two centuries of state history have produced great changes in the structure of government, they have also endowed our age with excessively detailed constitutions reflecting the conditions of other times and with ambivalent attitudes toward all the principal repositories of governmental power. Governors, originally near figureheads, have become, in some states, the strongest center of authority and of public confidence. Yet many states still struggle with a weak executive authority based upon outmoded constitutional patterns and traditions that find governors sharing executive power with a miscellany of other elected officials.

## An Outline of the Montana Constitution

The Montana Constitution consists of twenty-one articles which includes provisions governing the rights of persons, set forth the outline of the general governmental structure, and establish and define the powers of the different branches of government. Following the preamble, Articles I and II outline the boundaries and deal with

military reservations. Article III is a declaration of the rights of the people of the state in thirty-one separate sections. Article IV sets forth the three branches of government and states that "no person or collection of persons charged with the exercise of the powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed."

Article V grants the right of initiative and referendum to people, establishes the legislative branch of government, and grants to the Legislative Assembly the power to pass laws, levy taxes, and appropriate money within the limitations imposed by the constitution. This article also vests the power of impeachment in the House of Representatives and provides that impeachment shall be tried by the Senate sitting for that purpose. In addition to a number of sections prescribing the duties of the Legislative Assembly, Article V contains a substantial number of limitations on the authority of the legislative branch. Article VI also pertains directly to the legislative branch providing for apportionment and representation.

Article VII establishes the executive branch of state government and creates eleven of the seventeen constitutional officers and boards. The eleven executive officers and boards created by Article VII and the constitutional duties assigned to each, are as follows:[6]

## GOVERNOR

The office of governor is created by Article VII, Section I of the constitution, but the governor is mentioned more than twenty times in the constitution. Most of these references do not impose any significant duties or responsibilities on the governor. The primary source of the governor's power arises from his appointing power and from Article VII, Section 5 which provides: "The supreme executive power of the state shall be vested in the governor, who shall see that the laws are faithfully executed." The governor serves as an ex officio member of five constitutional boards.

## LIEUTENANT GOVERNOR

1. To assume the office of governor in case of the governor's failure to qualify in office, death, resignation, absence from the state, impeachment or conviction of felony or infamous crime. (Art. VII, Sec. 14).
2. To serve as President of the Senate. (Art. VII, Sec. 15).

## SECRETARY OF STATE

1. To file any bill not approved by the governor after final adjournment of the legislative assembly. (Art. VII, Sec. 12).
2. To keep the great seal of Montana. (Art. VII, Sec. 17).
3. To countersign all grants and commissions made in the name and by the authority of the state of Montana. (Art. VII, Sec. 18).
4. To serve as a member of the Board of State Prision Commissioners. (Art. VII, Sec. 20).
5. To serve as a member of the Board of Examiners. (Art. VII, Sec. 20).
6. To serve as a member of the State Board of Land Commissioners. (Art. XI, Sec. 4).
7. To publish proposed constitutional amendments prior to the general election. (Art. XIX, Sec. 9).
8. To keep a duplicate record of all gifts, donations, grants and legacies to the state permanent school fund and the state permanent revenue fund. (Art. XXI, Sec. 4).

6. The State Board of Education, State Board of Equalization, State Depository Board, Department of Agriculture, Department of Labor and Industry, and State Board of Land Commissioners are other constitutional agencies created by other articles.

## ATTORNEY GENERAL

1. To serve as a member of the Board of State Prison Commissioners. (Art. VII, Sec. 20).
2. To serve as a member of the Board of Examiners. (Art. VII, Sec. 20).
3. To serve as a member of the State Board of Land Commissioners. (Art. XI, Sec. 4).
4. To serve as a member of the State Board of Education. (Art. XI, Sec. 11).

## STATE TREASURER

1. To keep a separate account of each fund in his hands, and at the end of each quarter of the fiscal year to report to the governor in writing under oath the amount of all moneys in his hands to the credit of every such fund and the place or places where the same is kept or deposited and the number and amount of every warrant paid or redeemed by him during the quarter. (Art. XII, Sec. 13).
2. To serve as a member of the State Depository Board. (Art. XII, Sec. 14).
3. To apportion all interest collected for the trust and legacy fund each quarter to all the separate and integral funds which constitute the trust and legacy fund. (Art. XXI, Sec. 9).
4. To keep deposits of money belonging to the Montana trust and legacy fund separate and distinct from other deposits of money in his keeping. (Art. XXI, Sec. 10).

## STATE AUDITOR

1. To serve as a member of the State Depository Board. (Art. XII, Sec. 14).

## SUPERINTENDENT OF PUBLIC INSTRUCTION

1. To serve as a member of the State Board of Land Commissioners. (Art. XI, Sec. 4).
2. To serve as a member of the State Board of Education. (Art. XI, Sec. 11).

## BOARD OF STATE PRISON COMMISSIONERS

1. To have supervision of all matters connected with the State Prison as prescribed by law. (Art. VII, Sec. 20).

## BOARD OF EXAMINERS

1. To examine all claims against the state, except salaries or compensation of officers fixed by law. (Art. VII, Sec. 20).

## STATE BOARD OF PARDONS

1. To approve any act of the governor granting pardons, remitting fines and forfeitures or commuting punishments. (Art. VII, Sec. 9).

## STATE EXAMINER

1. To examine the accounts of the State Treasurer, Supreme Court Clerk, district court clerks, all county treasurers, and treasurers of such other public institutions as may be prescribed by law. (Art. VII, Sec. 8).

Article VIII establishes the judicial branch which consists of a Supreme Court, district courts, justices of the peace, the Senate sitting as a court of impeachment, and other inferior courts established by the Legislative Assembly. This article also establishes the office of Clerk of the Supreme Court, county attorneys, and police and municipal courts.

Suffrage and qualifications to hold office are outlined in Article IX; Article X is concerned with state institutions and public buildings; Article XI deals with public school funds, free public schools, and establishes the State Board of Education and State Board of Land Commissioners. Article XII empowers the Legislative Assembly to levy taxes for the support of government, earmarks revenues for highway purposes, exempts certain property from taxation, provides for the taxation of mines and mining claims, prohibits the legislature from appropriating amounts in excess of anticipated revenues, establishes a State Depository Board, establishes a State Board of Equalization, creates county boards of equalization, and contains various other provisions on revenue and taxation.

Article XIII prohibits the legislature from incurring state debt in excess of $100,000 unless approved by the electorate, Article XIV is concerned with military affairs, and Article XV outlines state regulation of corporations. The governmental framework for counties is contained in Article XVI as is permission for the legislature to pass laws for the incorporation of cities. Article XVII treats public lands; Article XVIII provides for labor and creates a Department of Agriculture and a Department of Labor and Industry. Article XIX provides for amendment of the constitution, and Articles XX and XXI deal with the schedule under which the constitution became effective and the trust and legacy fund.

## The Constitution as a Document

### GENERAL[7]

Basic to all other criteria by which the constitution as a document can be measured is the principle that a constitution expresses *fundamental law,* or law which provides the basic foundation for a political system. Although "fundamental" defies a precise definition in this context, the term implies law of great permanence and minimal detail thus requiring few amendments to meet changing conditions. Fundamental law must reflect a fair degree of unanimity of thought among the citizens and must be concerned with principles rather than with the mechanical means of implementing principles. *Statutory law,* on the other hand, should deal with emerging problems faced by the state within the broad framework of principles established by the fundamental law of the constitution. Statutory law lacks the permanency of constitutional law and must often be detailed to accomplish its purpose.

The consequences of ignoring the principle that a constitution should only contain fundamental law have been clear, and they have been serious. Such documents are too rigid to cope successfully with emerging problems. For example, Kansas found it necessary to amend its constitution twice before the state could construct a highway system and qualify for federal grants. Nor can even the most specific state constitutional provisions be depended upon to insure or prevent certain actions. A striking example is the provision contained in many state constitutions that the legislature *shall* reapportion at certain intervals. Until recently, this provision was ignored by many state legislatures. Excessive detail also may perpetuate archaic offices in state government and result in a chronic need for amendment of the constitution. More serious, however, is the impairment of the state's capacity for self-government. It has been said that: "To the extent that a government is kept from doing harm by detailed restrictions on the exercise of its power, it is also kept from doing good, i.e., in providing for the needs of its people in the wisest and most effective way."

### CRITERIA USED TO MEASURE ADEQUACY AND METHODOLOGY

In its study of the Montana Constitution, the Council faced a major problem in resolving the precise meaning of "adequate" because there may be varying degrees of adequacy. The Council, in its comments on the Montana Constitution, has used the term "adequate" to mean only that a particular provision does not present a major obstacle to effective government. Thus, the fact that a provision is believed adequate does not imply that the provision is ideal or, in some cases, even necessary.

7. Discussion taken from *State Constitutions: The Shape of the Document, p. 23.*

The study began with a general comparision of the Montana constitutional provisions with comparable provisions in the constitutions of Alaska, Hawaii, Michigan, New Jersey, Puerto Rico, and the Model State Constitution of the National Municipal League. Some of these constitutions were chosen based upon the general opinion of authorities that they represent the better state constitutions, others because they are comparatively new documents. The Model State Constitution was used because this is the only document of its kind known to exist.

In reviewing the Constitution section by section and comparing the Montana provisions with the constitutions mentioned above, the Council did not adhere to rigid criteria to measure the "adequacy" of particular provisions. Use of fixed criteria might produce a desirable degree of uniformity in the conclusions, but at the expense of restricting discussion of the provisions exclusively to the criteria used. Generally, however, the Council agreed that the following questions might be asked during the review:

1. Is this provision needed?
2. Does the provision protect the people in their rights and treat them equally and impartially?
3. Do the provisions hamper the agencies of government in their attempts to discharge their responsibilities?
4. Are the provisions flexible enough to permit orderly change? Have they made change so difficult that badly needed improvements are long overdue?
5. Are the provisions so narrowly drawn or so statutory in character that they have become "amendment" breeders?
6. Are the provisions logically organized and free of deadwood?
7. Do the provisions make sense to the informed lay reader?
8. Are the provisions rendered inoperative because they conflict with, or have been superseded by, other sections of the Constitution or by federal law?

After a decision was reached to use six constitutions for comparative purposes and measure the provisions of the Montana Constitution using the general questions listed above, preliminary comments were prepared for each section. These comments included a comparision of present provisions with those of the 1884 constitution, pertinent explanatory information from the *Proceedings* of the 1889 convention when the present document was drafted, background information extracted from an unpublished thesis prepared by Dr. John Welling Smurr on the 1889 constitutional convention, and proposed amendments and amendments made to individual sections since 1889.[8] In some instances, such as the judicial article, a proposed comprehensive revision was reviewed in detail. The persons making this proposal and a representative of the district judges association were interviewed. After considering this information, recent decisions of federal courts that affect the Montana constitution, and pertinent state court cases applying the provisions, the Council prepared a brief comment on each section. After comments were agreed upon for the individual sections, a summary statement was prepared for each article.

The review was restricted almost exclusively to a determination of whether the present provisions are adequate. The Council concluded that their major responsibility was not to redraft the present document, nor to propose desirable provisions which might be added to the Montana Constitution. In some instances, however, suggested changes in language were prepared (for example, the suggested revision of Article XXI). The Council prepared alternative language only to illustrate how the present provisions might be improved. The revised sections should not be considered as a finished draft revision.

8. No record of debates at the 1884 convention exists.

# Chapter II
# ARTICLE I–BOUNDARIES

## Summary

This article of the Montana constitution contains a single section describing the boundaries of the state as they were described in the Organic Act which created Montana territory on March 2, 1867. The Enabling Act of February 22, 1889, which authorized Montana to become a state, provided that the boundaries of Dakota, Montana, and Washington territories should be the state Boundaries, and also made provision to divide Dakota Territory into the states of North and South Dakota. The state boundaries are, therefore, fixed by federal law which cannot be affected by state action. The Council concludes that the description of boundaries is unnecessary. The single section contained in this article could be repealed.

## Comments on Individual Sections of Article I

Section 1. The boundaries of the state of Montana shall be as follows, to wit: Beginning at a point formed by the intersection of the twenty-seventh degree of longitude west from Washington with the forty-fifth degree of north latitude, thence due west on the forty-fifth degree of latitude to a point formed by its intersection with the thirty-fourth degree of longitude west from Washington, thence due south along the thirty-fourth degree of longitude, to a point formed by its intersection with the crest of the Rocky mountains, thence following the crest of the Rocky mountains northward to its intersection with the Bitter Root mountains; thence northward along the crest of the Bitter Root mountains, to its intersection with the thirty-ninth degree of longitude west from Washington; thence along the thirty-ninth degree of longitude northward to the boundary line of the British Possessions; thence eastward along that boundary line to the twenty-seventh degree of longitude west from Washington; thence southward along the twenty-seventh degree of longitude to the place of beginning.

**COMMENT**: See summary comment above.

# Chapter III
# ARTICLE II–MILITARY RESERVATIONS

## Summary

This article was not proposed by members of the 1889 convention; it was suggested by the U.S. Department of War. The constitutions of North Dakota and South Dakota, which became states under the same Enabling Act as Montana, do not have similar provisions. Moreover, Fort Assinaboine was abandoned as a military post in 1911; Fort Custer no longer exists; Fort Keogh is now a federal agricultural experiment station and Air Force radar site; Fort Maginnis is owned by Montana; part of Fort Missoula was given to the University of Montana and a part is used by the National Guard; and only a very small portion of former Fort Shaw is now owned by the federal government. The Council concludes that the single section in this article is obsolete. It could be repealed.

## Comments on Individual Sections of Article II

Section 1. Authority is hereby granted to and acknowledged in the United States to exercise exclusive legislation, as provided by the constitution of the United States, over the military reservations of Fort Assinaboine, Fort Custer, Fort Keogh, Fort Maginnis, Fort Missoula, and Fort Shaw, as now established by law, so long as said places remain military reservations, to the same extent and with the same effect as if said reservations had been purchased by the United States by consent of the legislative assembly of the state of Montana; and the legislative assembly is authorized and directed to enact any law necessary or proper to give effect to this article.

Provided, that there be and is hereby reserved to the state the right to serve all legal process of the state, both civil and criminal, upon persons and property found within any of said reservations, in all cases where the United States has not exclusive jurisdiction.

COMMENT: See summary comment above.

# Chapter IV

# ARTICLE III–A DECLARATION OF THE RIGHTS OF THE PEOPLE OF THE STATE OF MONTANA

## Summary

Montana, like most other states, included a bill of rights as one of the first articles of its constitution. Ideally, such a statement should affirm with simplicity the essential rights of individuals which cannot be diminished and should formulate the rights with clarity to ensure their protection against interference by any governmental agency.

After a review of the Montana bill of rights, the Council concludes that most sections of this article are adequate, but some provisions should be improved. Specifically, twenty-one of the sections appear adequate. Section 24, which requires that laws for punishment of crime be founded on principles of reformation and prevention, is adequate but probably has little force. Section 2, the power to alter the form of government, is adequate although it may be unnecessary. Three sections (25, 28, and 29) are unnecessary and should be repealed. Five sections should be revised as follows:

**Section 4. This section could be replaced with a more adequate statement of religious freedom similar to the provision of the federal constitution and the provision of the Alaska constitution.**

**Section 7. Under the same safeguards now extended to other searches, interception of oral or other communications should be authorized** *if these methods are employed in a manner which provides protection for individual rights.*

**Section 8. Reference to justice courts should be deleted.**

**Section 19. This section should be revised so the legislature may restrict the availability of bail for persons who might do violence to themselves or another person. This would inject desirable flexibility into the present provision with minimum danger that this power would be abused. Legislative acts, and actions of public officials, would be subject to review by the courts.**

**Section 23. Reference to justice courts should be deleted.**

## Comments on Individual Sections of Article III

Section 1. All political power is vested in and derived from the people; all government of right originates with the people; is founded upon their will only, and is instituted solely for the good of the whole.

**COMMENT: This section recognizes the political primacy of the people and is more philosophical than constitutional in nature. Five of the six constitutions used for comparative purposes have similar provisions, however, and the Council concludes that this section is adequate.**

Section 2. The people of the state have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state, and to alter and abolish their constitution and form of government, whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the constitution of the United States.

**COMMENT: Four of the six constitutions used for comparison do not have a comparable section. Although the section may not be absolutely necessary, the Council concludes that it is adequate.**

Section 3. All persons are born equally free, and have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways.

**COMMENT: Of the six constitutions used for comparative purposes, two do not have comparable provisions and two recognize not only these general rights but also obligations attendant to the rights. The Council recognizes that this section does not mention obligations, but the present section is adequate.**

Section 4. The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed, and no person shall be denied any civil or political right or privilege on account of his opinions concerning religion, but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, by bigamous or polygamous marriage, or otherwise, or justify practices inconsistent with the good order, peace, or safety of the state, or opposed to the civil authority thereof, or of the United States. No person shall be required to attend any place of worship or support any ministry, religious sect, or denomination, against his consent; nor shall any preference be given by law to any religious denomination or mode of worship.

**COMMENT: All six constitutions used for comparative purposes have similar provisions; three have statements virtually indentical to the federal provision. The Council concludes that this section could be replaced with a more adequate statement similar to the federal provision and to the Alaska provision which reads: "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof."**

Section 5. All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

**COMMENT: Five of the six constitutions used for comparative purposes do not have similar provisions. The Council concludes this section is adequate.**

Section 6. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial, or delay.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. This right may be insured by "due process" and "equal protection" rights, but the Council concludes that the section is adequate.**

Section 7. The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, nor without probable cause, supported by oath or affirmation, reduced to writing.

**COMMENT: All six constitutions used for comparative purposes have similar provisions; one expressly prohibits wire-tapping. The Council believes that law enforcement officers should have permission to use reasonable methods to compile evidence *if these methods are employed in a manner which provides protection for individual rights.* The Council concludes that this section would be more adequate if it specifically recognized the right to use modern surveillance methods as authorized by a court. The section could read: "The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place, *utilize electronic or other means to intercept oral or other communications,* or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, nor without the probable cause, supported by oath or affirmation, reduced to writing."**

Section 8. Criminal offenses of which justice's courts and municipal and other courts, inferior to the district courts, have jurisdiction, shall, in all courts inferior to the district court, be prosecuted by complaint. All criminal actions in the district court, except those on appeal, shall be prosecuted by information, after examination and commitment by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment without such examination or commitment, or without such leave of the court. A grand jury shall consist of seven persons, of whom five must concur to find an indictment.

A grand jury shall only be drawn and summoned when the district judge shall, in his discretion, consider it necessary, and shall so order.

**COMMENT: Four of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be revised by deleting reference to courts inferior to district courts. The first sentence could read: "Criminal offenses of which courts inferior to the district courts have jurisdiction shall, in all those courts, be prosecuted by complaint."**

Section 9. Treason against the state shall consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort; no person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on his confession in open court; no person shall be attainted of treason or felony by the legislative assembly; no conviction shall work corruption of blood or forfeiture of estate; the estates of persons who may destroy their own lives shall descend or vest as in cases of natural death.

**COMMENT: This section paraphrases a similar provision in the federal constitution. Only three of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.**

Section 10. No law shall be passed impairing the freedom of speech; every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts.

**COMMENT: All six constitutions used for comparative purposes have similar provisions, and the Council concludes that this section is adequate.**

Section 11. No ex post facto law nor law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislative assembly.

**COMMENT: Four of the six constitutions used for comparative purposes have similar provisions. The Council concludes this section is adequate.**

Section 12. No person shall be imprisoned for debt except in the manner prescribed by law, upon refusal to deliver up his estate for the benefit of his creditors, or in cases of tort, where there is strong presumption of fraud.

**COMMENT: Only one of the six constitutions used for comparative purposes does not have a similar provision. The Council concludes that this section is adequate.**

Section 13. The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.

**COMMENT: Three of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.**

Section 14. Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner.

**COMMENT: Two of the six constitutions used for comparative purposes do not have similar provisions. None of the four having a similar provision require that the compensation be paid to a court for the owner, but the Council concludes that this section is adequate.**

Section 15. The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. Private roads may be opened in the manner to be prescribed by law, but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited.

**COMMENT: The Council concludes that this section is adequate.**

Section 16. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same.

**COMMENT: All six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.**

Section 17. No person shall be imprisoned for the purpose of securing his testimony in any criminal proceeding longer than may be necessary in order to take his deposition. If he can give security for his appearance at the time of the trial, he shall be discharged upon giving the same; if he cannot give security, his deposition shall be taken in the manner prescribed by law, and in the presence of the accused and his counsel, or without their presence, if they shall fail to attend the examination after reasonable notice of the time and place thereof. Any deposition authorized by this section may be received as evidence on the trial, if the witness shall be dead or absent from the state.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The wording of this section caused considerable debate during the 1889 constitutional convention. Proponents of the section cited cases where the accused was released on bail, but the innocent witness was held in jail because the prosecutor wished to insure his attendance at the trial. Authority to receive depositions from witnesses absent from the state may have been negated, in part, by the United States Supreme Court in *Pointer v. Texas*, 380 U.S. 400. The Council concludes that this section is adequate.**

Section 18. No person shall be compelled to testify against himself, in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense.

**COMMENT: All six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.**

Section 19. All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.

**COMMENT: All six constitutions used for comparative purposes have similar provisions. Although adequate in general, the Council concludes that the section should be amended to allow the legislature to limit the availability of bail if there is probable cause that the person may do violence to himself or another person.**

Section 20. Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted.

**COMMENT: All six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.**

Section 21. The privilege of the writ of habeas corpus shall never be suspended, unless, in case of rebellion, or invasion, the public safety require it.

**COMMENT: All six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.**

Section 22. The military shall always be in strict subordination to the civil power; no soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, except in the manner prescribed by law.

**COMMENT: Only one of the six constitutions used for comparative purposes does not have a similar provision. The Council concludes that this section is adequate.**

Section 23. The right of trial by jury shall be secured to all, and remain inviolate, but in all civil cases and in all criminal cases not amounting to felony, upon default of appearance, or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number provided by law. A jury in a justice's court, both in civil cases and in cases of criminal misdemeanor, shall consist of not more than six persons. In all civil actions and in all criminal cases not amounting to felony, two-thirds in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all such jury concurred therein.

**COMMENT: Four of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be revised by deleting references to justice courts. The second sentence could read: "A jury in a court inferior to a district court . . ."**

Section 24. Laws for the punishment of crime shall be founded on the principles of reformation and prevention, but this shall not affect the power of the legislative assembly to provide for punishing offenses by death.

COMMENT: Only one of the six constitutions used for comparative purposes has a similar provision. Although this section may have little, if any force, the Council concludes that it is adequate.

Section 25. Aliens and denizens shall have the same right as citizens to acquire, purchase, possess, enjoy, convey, transmit, and inherit mines and mining property, and milling, reduction, concentrating, and other works, and real property necessary for or connected with the business of mining and treating ores and minerals: provided, that nothing herein contained shall be construed to infringe upon the authority of the United States to provide for the sale or disposition of its mineral and other public lands.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is obsolete and should be repealed.

Section 26. The people shall have the right peaceably to assemble for the common good, and to apply to those invested with the powers of government for redress of grievances by petition or remonstrance.

COMMENT: All six constitutions used for comparative purposes have similar provisions. None, however, require that the assembly be "for the common good." Although the language "for the common good" might be deleted, the Council concludes that this section is adequate.

Section 27. No person shall be deprived of life, liberty, or property without due process of law.

COMMENT: All six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.

Section 28. There shall never be in this state either slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted.

COMMENT: Only one of the six constitutions used for comparative purposes has a similar provision. This right is guaranteed by the Thirteenth Amendment to the United States Constitution. The Council concludes that this section is unnecessary and should be repealed.

Section 29. The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.

Section 30. The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.

COMMENT: Five of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.

Section 31. No armed person or persons or armed body of men shall be brought into this state for the preservation of the peace, or the suppression of domestic violence, except upon the application of the legislative assembly, or of the governor when the legislative assembly cannot be convened.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.

# Chapter V
# ARTICLE IV–DISTRIBUTION OF POWERS

## Summary

The constitutions of forty states explicitly refer to the three branches of government; ten state constitutions and the federal constitution have no specific provision for separation of powers. Of the six constitutions used for comparative purposes, only two (Michigan and New Jersey) have a similar provision. Although a power of government may be vested in more than one branch in modern times, this article clearly expresses the basic concept of separation of powers and removal might imply rejection of that concept. Substitution of the term "branches" for the term " departments" would be more accurate, but the Council concludes that this article is adequate at the present time.

## Comments on Individual Sections of Article IV

Section 1. The powers of the government of this state are divided into three distinct departments: The legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

**COMMENT:** See summary comment above.

# Chapter VI
# ARTICLE V–LEGISLATIVE DEPARTMENT

## Summary

The legislative articles of state constitutions vary substantially in both length and content. Virtually all, however, contain provisions relating to five major topics including legislators, composition of the body and sessions, procedures, legislative powers, and restrictions on legislative powers. Like most other articles, the legislative article is usually not complete in itself. That is, numerous provisions located outside the legislative article affect the powers of the legislative branch and place limitations on the lawmaking function. Ideally, the legislative article should accomplish several objectives in a minimum of length. First, it should establish the lawmaking branch of government and provide for the selection of its members. Second, it should describe the major powers to be exercised by the legislative branch and, where deemed necessary and desirable, prescribe the manner in which these powers may be exercised.

Unfortunately, many state constitutions fall short of the ideal. It has been said that state legislative creativity, where it is found, exists despite the ideology and provisions contained in the state constitution.[9] In some cases the constitutional provisions have circumscribed legislatures to the extent that they find it difficult to keep pace with the ideas and forms of modern government. Yet, the earliest state constitutions typically vested broad power in the legislature and set few procedural requirements for the legislative process. During the nineteenth century, the trust reflected in the early state constitutions was replaced by popular distrust of the legislative branch. A student of state constitutions said: "By 1880 the pattern for state constitutions as legal codes, and as obstructions to the free exercise of legislative power, was clearly set."[10]

One writer noted that: "Much of the work of constitutional revision so far as the legislature is concerned is . . . a matter of determining not what should be added to the constitution but what might properly be taken out of it." Restrictions not only affect specific actions of the legislature but may also have the cumulative effect of discouraging legislative imagination and creativity.[11]

"To the extent that a government is kept from doing harm by detailed restrictions on the exercise of its power, it is also kept from doing good, i.e., in providing for the needs of its people in the wisest and most effective way. This is the dilemma which every instrumentality of government must face, but none quite so acutely as our state legislatures."[12] Moreover, in seeking an answer to this dilemma, it seems doubtful that legislative organization and performance can be improved substantially by merely tinkering with the legislative article.

> **Legislatures which are restricted can and often do find ways to avoid constitutional restraints but this encourages subterfuge and adds unnecessarily to expense in time and money. Furthermore, hindering provisions impede those legislatures which are trying to do their work effectively and responsibly, and they diminish the stature of the legislature in the eyes of the public. Reforms must be directed toward making the legislature a decision-making body with power commensurate with responsibility.**[13]

The legislative article of the Montana constitution is lengthy (forty-four separate sections) and detailed.[14] It contains sections reflecting the ideals of clarity and brevity, sections which are excessively detailed, sections which are clearly statutory in nature, and sections which are obsolete.

Following a review of the legislative article, the Council concludes that only about one-half the sections in this article are adequate in their present form. Of the forty-four sections contained in the article, only twenty-eight are adequate and of this number one is ambiguous (Section 25), two contain obsolete material (Sections 6 and 39), and

9. Alexander Heard (ed.), *State Legislatures in American Politics* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1966), p. 47.
10. Byron W. Abernethy quoted in *State Legislatures in American Politics*, p. 48.
11. John P. Wheeler, Jr. (ed.), *Salient Issues of Constitutional Revision* (National Municipal League: New York, 1961), pp. 68-69.
12. *State Constitutions: The Shape of the Document*, p. 23.
13. *Salient Issues of Constitutional Revision*, p. 79.
14. Section numbers run to 46, but 2 sections were repealed. In sharp contrast, the legislative article of a proposed constitution for Maryland contains 17 sections.

four (Sections 29, 32, 34, and 35) may be unnecessary. Moreover, substantial improvement could be made by some additions to Article V such as a provision allowing the legislature to call itself into special session.

The Council further concludes that ten sections (8, 21, 27, 28, 30, 38, 41, 42, 43, and 44) should be repealed. Some of these sections are substantive; some regulate legislative procedures. If necessary, all the subjects covered in these sections should be regulated by statute or legislative rule. The Council declines to comment on three sections (5, 31, and 46). Amendments have been proposed to Sections 5 and 31 which will be considered at the 1968 general election; Section 46 was added by amendment in 1966. Three sections should be revised as follows:

**Section 1. This section on initiative and referendum should be revised for clarification. It might also be simplified substantially.**

**Section 22. This section should be revised by deleting the requirement that bills be "printed" and substituting a requirement that copies of bills be provided to members of the Legislative Assembly.**

**Section 40. This section should be revised to clearly state that the Governor cannot veto joint resolutions (including those ratifying amendments to the U.S. Constitution) nor bills proposing amendments to the Montana Constitution.**

## Comments on Individual Sections of Article V

Section 1. The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and a house of representatives; but the people reserve to themselves power to propose laws, and to enact or reject the same at the polls, except as to laws relating to appropriations of money, and except as to the laws for the submission of constitutional amendments, and except as to local or special laws, as enumerated in article V, section 26, of this constitution, independent of the legislative assembly; and also reserve power, at their own option, to approve or reject at the polls, any act of the legislative assembly, except as to laws necessary for the immediate preservation of the public peace, health, or safety, and except as to laws relating to appropriations of money, and except as to laws for the submission of constitutional amendments, and except as to local or special laws, as enumerated in article V, section 26, of this constitution. The first power reserved by the people is the initiative and eight per cent. of the legal voters of the state shall be required to propose any measure by petition; provided, that two-fifths of the whole number of the counties of the state must each furnish as signers of said petition eight per cent. of the legal voters in such county, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state, not less than four months before the election at which they are to be voted upon.

The second power is the referendum, and it may be ordered either by petition signed by five per cent. of the legal voters of the state, provided that two-fifths of the whole number of the counties of the state must each furnish as signers of said petition five per cent. of the legal voters in such county, or, by the legislative assembly as other bills are enacted.

Referendum petitions shall be filed with the secretary of state, not later than six months after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the governor shall not extend to measures referred to the people by the legislative assembly or by initiative referendum petitions.

All elections on measures referred to the people of the state shall be had at the biennial regular general election, except when the legislative assembly, by a majority vote, shall order a special election. Any measure referred to the people shall still be in full force and effect unless such petition be signed by fifteen per cent. of the legal voters of a majority of the whole number of the counties of the state, in which case the law shall be inoperative until such time as it shall be passed upon at an election, and the result has been determined and declared as provided by law. The whole number of votes cast for the governor at the regular election last preceding the filing of any petition for the initiative or referendum shall be the basis on which the number of legal petitions and orders for the initiative and for the referendum shall be filed with the secretary of state; and in submitting the same to the people, he, and all other officers, shall be guided by the general laws and the act submitting this

amendment, until legislation shall be especially provided therefor. The enacting clause of every law originated by the initiative shall be as follows:

"Be it enacted by the people of Montana."

This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure.

**COMMENT: The provisions of this section on the initiative and referendum were added by amendment effective December 7, 1906. Of the six constitutions used for comparative purposes, three do not have provisions for initiative and referendum. Although generally adequate, the Council concludes that this section should be revised. The section could be revised to read substantially as follows:**

Section 1. The legislative authority of the state is vested in the legislative assembly consisting of a senate and a house of representatives, but the people may enact laws by initiative and approve or reject acts of the legislature by the referendum.

Section ___. (1) Laws may be initiated on all matters except appropriations of money, amendments to the constitution, and laws prohibited by Section 26, Article V. Initiative petitions must be signed by eight percent (8%) or more of the legal voters in each of two-fifths (2/5) or more of the counties and the total number of signers must be eight percent (8%) or more of the total legal voters of the state. Each petition must contain the full text of the proposed measure. Petitions must be filed with the secretary of state four (4) months or more prior to the election at which they will be voted upon. The enacting clause of all initiative measures shall be: "Be it enacted by the people of the state of Montana."

(2) Unless necessary for the immediate preservation of public peace, health, or safety, an appropriation of money, or a proposed amendment to the constitution, all acts of the legislature are subject to referendum. A referendum may be ordered by the legislative assembly, or upon petitions signed by five percent (5%) or more of the legal voters in each of two-fifths (2/5) or more of the counties and the total number of signers must be five percent (5%) or more of the total legal voters of the state. Referendum petitions must be filed with the secretary of state no later than six (6) months after adjournment of the legislative assembly.

(3) All measures referred to the people shall be voted upon at the regular biennial election unless a special election is ordered by the legislative assembly. Measures shall be submitted to the people as provided by general laws unless otherwise ordered by the legislative assembly.

(4) Measures referred to the people are in full force and effect unless suspended by petitions signed by fifteen percent (15%) or more of the legal voters in each county and filed with the secretary of state. The measures suspended become operative if approved by a majority of the legal voters at an election.

(5) The number of legal voters for each county and for the state is determined by the votes cast for governor in the regular election immediately preceding filing of petitions for initiative or referendum measures.

(6) The governor does not have power to veto initiative or referendum measures.

Section 2. Senators shall be elected for the term of four years, and representatives for the term of two years, except as otherwise provided in this constitution.

**COMMENT: All six constitutions used for comparative purposes contain similar provisions although one does not specify the terms of office; five fix the term of office for representative at two years; four fix the term of office for senator at four years and one fixes the term for senator at six years. The Council concludes that this section is adequate.**

Section 3. No person shall be a representative who shall not have attained the age of twenty-one years, or a senator who shall not have attained the age of twenty-four years, and who shall not be a citizen of the United States, and who shall not (for at least twelve months next preceding his election) have resided within the county or district in which he shall be elected.

COMMENT: All six constitutions used for comparative purposes contain similar provisions. The Council concludes that this section is adequate although the age requirements are admittedly arbitrary.

Section 4. Repealed by an amendment proposed in 1965 and adopted December 6, 1966.

COMMENT: None.

Section 5. Each member of the first legislative assembly, as a compensation for his services shall receive six dollars for each day's attendance, and twenty cents for each mile necessarily traveled in going to and returning from the seat of government to his residence by the usually traveled route, and shall receive no other compensation, perquisite, or allowance whatsoever.

No session of the legislative assembly, after the first, which may be ninety days, shall exceed sixty days.

After the first session, the compensation of members of the legislative assembly shall be as provided by law; provided, that no legislative assembly shall fix its own compensation.

COMMENT: Two of the six constitutions used for comparative purposes contain provisions on compensation similar to the first and third sentences of this section; three provide for annual salaries; one provides only that the compensation and expense allowances shall be set by law.

All six constitutions used for comparative purposes provide for annual sessions, and five do not impose any limit on the length of regular sessions (Alaska imposes a thirty day limit on special sessions). One constitution (Hawaii) sets the session limits at sixty days for regular sessions in odd numbered years and thirty days for budget sessions in even numbered years. A proposed amendment which will be voted upon in 1968 would amend this section to read as follows:

"Section 5. No session of the legislative assembly shall exceed eighty (80) days. The compensation of the members of the legislative assembly shall be as provided by law; however, no legislative assembly shall fix its own compensation. Per diem and expense payments to members for days in session shall not be made for more than eighty (80) days."

Because of the proposed constitutional amendment,the Council declines to comment on the adequacy of this section. Specification of a certain number of *legislative* days, however, would allow the legislature wide discretion in determining the length of sessions.

Section 6. The legislative assembly (except the first) shall meet at the seat of government at twelve o'clock noon, on the first Monday of January, next succeeding the general election provided by law, and at twelve o'clock noon, on the first Monday of January, of each alternate year thereafter, and at other times when convened by the governor.

The term of service of the members thereof shall begin the next day after their election, until otherwise provided by law; provided, that the first legislative assembly shall meet at the seat of government upon the proclamation of the governor after the admission of the state into the Union, upon a day to be named in said proclamation, and which shall not be more than fifteen nor less than ten days after the admission of the state into the Union.

COMMENT: The proposed 1884 constitution fixed the meeting date as the second Tuesday in January. Five of the six constitutions used for comparative purposes fix the date of meeting; one provides that the meeting shall be provided by law. The earliest date specified is the second Monday in January. The Council concludes that this section is adequate, but part of the section is obsolete.

Section 7. No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the state; and no member of congress, or other person holding an office (except notary public, or in the militia) under the United States or this state, shall be a member of either house during his continuance in office.

COMMENT: Five of the six constitutions used for comparative purposes have similar provisions. The Council concludes that the section is adequate.

Section 8. No member of either house shall, during the term for which he shall have been elected, receive any increase of salary or mileage under any law passed during such term.

COMMENT: Because of the language "no legislative assembly shall fix its own compensation" contained in Section 5, Article V, this section is unnecessary. The Council concludes that it should be repealed.

Section 9. The senate shall, at the beginning and close of each regular session, and at such other times as may be necessary, elect one of its members president pro tempore. The house of representatives shall elect one of its members speaker. Each house shall choose its other officers, and shall judge of the elections, returns, and qualifications of its members.

COMMENT: All six constitutions used for comparative purposes contain similar provisions, but none require selection of a senate president pro tempore. Four of the six constitutions do not provide for a lieutenant governor; presiding officers of both houses are selected from the members. Although generally adequate, the Council questions whether it is necessary to select a senate president pro tempore at both the beginning and close of each session.

Section 10. A majority of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each house may prescribe.

COMMENT: All six constitutions used for comparative purposes provide that the legislative assembly may compel attendance, but only five specifically state that a majority of the members is a quorum. The Council concludes that this section is adequate.

Section 11. Each house shall have the power to determine the rules of its proceedings, and punish its members or other persons for contempt or disorderly behavior in its presence; to protect its members against violence or offers of bribe or private solicitation, and with the concurrence of two-thirds, to expell a member, and shall have all other powers necessary for a legislative assembly of a free state.

A member expelled for corruption shall not thereafter be eligible to either house of the legislative assembly; and punishment for contempt or disorderly behavior shall not bar a criminal prosecution for the same offense.

COMMENT: All of the six constitutions used for comparative purposes provide that each house determines its rules and provide for expulsion of members upon concurrence by an extraordinary majority (five specify two-thirds of the members, one specifies three-fourths of the members). None of the six constitutions compared has a provision similar to the last sentence of this section. The Council concludes that this section is adequate.

Section 12. Each house shall keep a journal of its proceedings, and may, in its discretion, from time to time, publish the same, except such parts as require secrecy, and the ayes and noes on any question shall, at the request of any two members, be entered on the journal.

COMMENT: All six constitutions used for comparative purposes have similar provisions. The wording of this section raises the question: If it is mandatory that each house keep a journal, should publication be mandatory also? The Council concludes, however, that this section is adequate.

Section 13. The sessions of each house and of the committees of the whole shall be open, unless the business is such as requires secrecy.

COMMENT: Four of the six constitutions used for comparative purposes do not have similar provisions. The Council concludes, however, that this section is adequate.

Section 14. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

COMMENT: Five of the six constitutions used for comparative purposes have similar provisions. Only two state constitutions (Connecticut and North Carolina) have no provisions for adjournment by one house by itself for a limited time; such a provision is unnecessary in Nebraska because of the unicameral legislature. The Council concludes that this section is adequate.

Section 15. The members of the legislative assembly shall, in all cases, except treason, felony, violation of their oath of office, and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

COMMENT: All six constitutions used for comparative purposes have similar provisions; two extend this immunity for a short period before and following the session (one constitution specifies five days, the other fifteen days). Only six state constitutions (Florida, Maryland, New York, North Carolina, Rhode Island, and Vermont) do not provide immunity from arrest during sessions. The Council concludes that this section is adequate.

Section 16. The sole power of impeachment shall vest in the house of representatives; the concurrence of a majority of all the members being necessary to the exercise thereof. Impeachment shall be tried by the senate sitting for that purpose, and the senators shall be upon oath or affirmation to do justice according to law and evidence. When the governor or lieutenant-governor is on trial, the chief justice of the supreme court shall preside. No person shall be convicted without a concurrence of two-thirds of the senators elected.

COMMENT: All six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.

Section 17. The governor, and other state and judicial officers, except justices of the peace, shall be liable to impeachment for high crimes and misdemeanors, or malfeasance in office, but judgment in such cases shall only extend to removal from office and disqualification to hold any office of honor, trust, or profit under the laws of the state. The party, whether convicted or acquitted, shall, nevertheless, be liable to prosecution, trial, judgment, and punishment according to law.

COMMENT: Five of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.

Section 18. All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.

Section 19. No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose.

COMMENT: Four of the six constitutions used for comparative purposes do not have provisions similar to "No law shall be passed except by bill . . .", and two prohibit amendments to change the original purpose of a bill. Of the fifty state constitutions, only thirteen prohibit altering the original purpose of a bill by amendment. However, the Council concludes that this section is adequate.

Section 20. The enacting clause of every law shall be as follows: "Be it enacted by the Legislative Assembly of the State of Montana."

COMMENT: Two of the six constitutions used for comparative purposes do not have similar provisions. Only five state constitutions fail to specify an explicit enacting clause (California, Delaware, Georgia, Pennsylvania, and Virginia). The Council concludes that this section is adequate.

Section 21. No bill for the appropriation of money, except for the expenses of the government, shall be introduced within ten days of the close of the session, except by unanimous consent in the house in which it is sought to be introduced.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. Of the fifty state constitutions, only eleven forbid bill introductions during certain periods (Arkansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, North Dakota, Texas, Washington, and Wyoming). The Council concludes that this section is not adequate. It should be repealed. Any time limits for introduction of bills should be set by legislative rule.

Section 22. No bill shall be considered or become law unless referred to a committee, returned therefrom, and printed for the use of the members.

**COMMENT: Only one of the six constitutions used for comparative purposes has a similar provision. Eleven of the fifty state constitutions contain this type of requirement (Alabama, Colorado, Kentucky, Louisiana, Mississippi, Missouri, Montana, Pennsylvania, Texas, Virginia, and Wyoming). The Council concludes that this section should be revised by deleting the reference to printed bills. This could be done by substituting "copies provided" for the word "printed."**

Section 23. No bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such an act shall be void only as to so much thereof as shall not be so expressed.

**COMMENT: Of the six constitutions used for comparative purposes, two contain similar provisions, one excepts only general appropriation bills from the requirement of a single subject, and three specify only that every law shall embrace only one subject. Forty-one state constitutions limit bills to one subject, fifteen permit exceptions such as appropriations and general statutory revisions, twenty-six do not permit exceptions, and nine have no limitations on the number of subjects in a bill. (For additional information on the subjects in a bill, see Montana Legislative Council, *Bill Drafting Manual,* pages 37-39.) The Council concludes that this section is adequate.**

Section 24. No bill shall become law except by a vote of a majority of all the members present in each house, nor unless on its final passage the vote be taken by ayes and noes, and the names of those voting be entered on the journal.

**COMMENT: All six constitutions used for comparative purposes contain similar provisions. Of the fifty state constitutions, eleven do not mention majority requirements for passage of a bill.Thirty-two state constitutions require entry of the ayes and noes in the journal on final passage of a bill, nineteen do not require that the names of members be entered, and eighteen require entry of votes in the journal at the request of various numbers of members. The Council concludes that this section is adequate.**

Section 25. No law shall be revised or amended, or the provisions thereof extended by reference to its title only, but so much thereof as is revised, amended or extended shall be re-enacted and published at length.

**COMMENT: Three of the six constitutions used for comparative purposes contain similar provisions. The question of whether or not a subsection or paragraph can be amended without setting out the parent section at length has never been adjudicated in Montana (see Montana Legislative Council, *Bill Drafting Manual,* pages 50-54 for a detailed discussion of this point). Although somewhat ambiguous, the Council concludes that this section is adequate.**

Section 26. The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For granting divorces; laying out, opening, altering or working roads or highways; vacating roads, town plats, streets, alleys or public grounds; locating or changing county seats; regulating county or township affairs; regulating the practice in courts of justice; regulating the jurisdiction and duties of justices of the peace, police magistrates or constables; changing the rules of evidence in any trial or inquiry; providing for changes of venue in civil or criminal cases; declaring any person of age; for limitation of civil actions, or giving effect to informal or invalid deeds; summoning or impaneling grand or petit juries; providing for the management of common schools; regulating the rate of interest on money; the opening or conducting of any election or designating the place of voting; the sale or mortgage of real estate belonging to minors or others under disability; chartering or licensing ferries or bridges or toll roads; chartering banks, insurance companies and loan and trust companies; remitting fines, penalties or forfeitures; creating, increasing or decreasing fees, percentages or allowances of public officers; changing the law of descent; granting to any corporation, association or individual the right to lay down railroad tracks, or any special or exclusive privilege, immunity or franchise whatever; for the punishment of crimes; changing the names of persons or places; for the assessment or collection of taxes; affecting the estates of deceased persons, minors or others under legal disabilities; extending the time for the collection of taxes; refunding money paid into the state treasury; relinquishing or extinguishing in whole or in part the indebtedness, liability or obligation of any corporation or person to this state, or to any municipal corporation therein; exempting property from taxation;

restoring to citizenship persons convicted of infamous crimes; authorizing the creation, extension or impairing of liens; creating offices, or prescribing the powers or duties of officers in counties, cities, township or school districts; or authorizing the adoption or legitimation of children. In all other cases where a general law can be made applicable, no special law shall be enacted.

COMMENT: Two of the six constitutions used for comparative purposes contain similar provisions; one requires public notice of intent prior to passage of special or local laws. Of the fifty state constitutions, thirty-one prohibit special laws if general laws can be applied, one states that the legislature shall provide by general law for matters usually pertaining to special legislation, four do not prohibit special legislation if general laws can be applied, and fourteen do not have general provisions on special legislation. The Council concludes that this section is adequate.

Section 27. The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the legislative assembly immediately after their titles have been publicly read, and the fact of signing shall be at once entered upon the journal.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that signing bills in open session is an unnecessary, time-consuming procedure. If notification to the house is necessary, the presiding officer could accomplish this by an announcement of the bills which have been signed. This section is inadequate and should be repealed.

Section 28. The legislative assembly shall prescribe by law the number, duties and compensation of the officers and employees of each house; and no payment shall be made from the state treasury, or be in any way authorized to any such person, except to an acting officer or employee elected or appointed in pursuance of law.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.

Section 29. No bill shall be passed giving any extra compensation to any public officer, servant or employee, agent or contractor, after services shall have been rendered or contract made, nor providing for the payment of any claim made against the state without previous authority of law, except as may be otherwise provided herein.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. It may be unnecessary. The Council concludes, however, that this section is adequate.

Section 30. All stationery, printing, paper, fuel and lights used in the legislative and other departments of government, shall be furnished, and the printing, and binding and distribution of the laws, journals, and department reports and other printing and binding, and the repairing and furnishing the halls and rooms used for the meeting of the legislative assembly, and its committees shall be performed under contract, to be given to the lowest responsible bidder below such maximum price and under such regulations as may be prescribed by law. No member or officer of any department of the government shall be in any way interested in any such contract; and all such contracts shall be subject to the approval of the governor and state treasurer.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions on supplies and the like; only one prohibits a legislator from having an interest in a contract authorized by the legislature. Only eight of the fifty state constitutions prohibit legislators from having an interest in contracts authorized by them. Commenting on consideration of this section at the 1889 convention, one writer noted: "This mighty guarantee of the liberties of a sovereign people was so perfect that it too passed without debate." A previous Council (1961-62) examined this section and concluded that it is obsolete. The Council concurs in this conclusion. This section should be repealed.

Section 31. Except as otherwise provided in this constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment: provided, that this shall not be construed to forbid the legislative assembly from fixing the salaries or emoluments of those officers first elected or appointed under this constitution, where such salaries or emoluments are not fixed by this constitution.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. A proposed amendment to this section, which will be voted upon in 1968, would change it to read as follows:

"Section 31. Except as otherwise provided in this constitution, no law shall extend the term of any public officer, or diminish his salary or emolument after his election or appointment; *provided, that this shall not be construed to forbid the legislative assembly from fixing the salaries or emoluments of those officers first elected or appointed under this constitution, where such salaries or emoluments are not fixed by this constitution.*" (Emphasis supplied)

**Although the emphasized wording is obsolete, the Council declines to comment further on this section because of the proposed amendment.**

Section 32. All bills for raising revenue shall originate in the house of representatives; but the senate may propose amendments, as in the case of other bills.

**COMMENT: Only two of the six constitutions used for comparative purposes have similar provisions. The Montana Supreme Court has ruled that this restriction does not apply to bills for other purposes which incidentally create revenue** *(Evers v. Hudson,* **36 M 135) or if revenue is a collateral and indirect result of the operation of the bill** *(State v. Driscall,* **101 M 348). The Council concludes that this section may be unnecessary, but it is adequate.**

Section 33. The general appropriation bills shall embrace nothing but appropriations for the ordinary expenses of the legislative, executive and judicial departments of the state, interest on the public debt and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.

**COMMENT: Only two of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.**

Section 34. No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. Although this section may be unnecessary, the Council concludes it is adequate.**

Section 35. No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate, but it may be unnecessary.**

Section 36. The legislative assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes, or to perform any municipal functions whatever.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.**

Section 37. No act of the legislative assembly shall authorize the investment of trust funds by executors, administrators, guardians or trustees in the bonds or stock of any private corporation.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. Of the fifty state constitutions, only two appear to have a similar provision. Section 38, Article III of the Wyoming constitution is identical to this section. Section 74, Article IV of the Alabama constitution was virtually identical until amended to allow investments to the amount guaranteed by the federal government. The Council concludes that this section is adequate.**

Section 38. The legislative assembly shall have no power to pass any law authorizing the state, or any county in the state, to contract any debt or obligation in the construction of any railroad, nor give or loan its credit to or in aid of the construction of the same.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. As noted by**

**one writer, this section is "a voice from the past." Moreover, Section 26, Article V appears to contain the same prohibition. The Council concludes that this section is obsolete and should be repealed.**

Section 39. Except as hereinafter provided, no obligation or liability of any person, association or corporation, held or owned by the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released or postponed, or in any way diminished by the legislative assembly; nor shall such liability or obligation be extinguished, except by the payment thereof into the proper treasury.

It shall however be lawful for the legislative assembly, in such manner as it may direct, to authorize the cancellation of any personal property taxes which are not a lien on real estate and which have been delinquent for ten (10) years or more.

It shall also be lawful for the legislative assembly, in such manner as it may direct, to authorize the cancellation of any contractual obligation owed to or held by a county, for seed grain, feed or other relief, the collection of which obligation is barred by the statute of limitations.

**COMMENT: This section was amended by adding the last two paragraphs in 1948. None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate although portions of it may be obsolete.**

Section 40. Every order, resolution or vote, in which the concurrence of both houses may be necessary, except on the question of adjournment, or relating solely to the transaction of the business of the two houses, shall be presented to the governor, and before it shall take effect be approved by him, or, being disapproved, be repassed by two-thirds of both houses, as prescribed in the case of a bill.

**COMMENT: None of the six constitutions used for comparative purposes require the governor's approval on measures other than bills. The Council believes that the governor should not have veto power over proposed constitutional amendments or joint resolutions ratifying amendments to the United States constitution. The Council concludes that this section is not adequate. It should be revised to specifically remove the governor from the amendment process for both the state and federal constitutions. The section could be changed to read as follows:**

**"Section 40. The governor may veto bills except bills proposing amendments to the Montana constitution. A vetoed bill shall become law if repassed by two-thirds (2/3) of the members of both houses."**

Section 41. If any person elected to either house of the legislative assembly shall offer or promise to give his vote or influence in favor of or against any measure or proposition, pending or proposed to be introduced into the legislative assembly, in consideration or upon condition that any other person elected to the same legislative assembly will give, or will promise or assent to give, his vote or influence, in favor of or against any other measure or proposition pending or proposed to be introduced into such legislative assembly, the person making such offer or promise shall be deemed guilty of solicitation of bribery. If any member of the legislative assembly shall give his vote or influence for or against any measure or proposition pending or proposed to be introduced in such legislative assembly, or offer, promise or assent so to do, upon condition that any other member will give, or will promise or assent to give his vote or influence in favor of or against any other measure or proposition pending or proposed to be introduced in such legislative assembly, or in consideration that any other member hath given his vote or influence for or against any other measure or proposition in such legislative assembly, he shall be deemed guilty of bribery; and any member of the legislative assembly, or person elected thereto, who shall be guilty of either such offenses, shall be expelled and shall not thereafter be eligible to the legislative assembly, and on the conviction thereof in the civil courts, shall be liable to such further penalty as may be prescribed by law.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. One person noted that this section ". . . generally made it known that honesty was henceforth to be the best policy . . . according to law . . ." The Council concludes that this section should be repealed and replaced by a statute.**

Section 42. Any person who shall directly or indirectly offer, give or promise any money or thing of value, testimonial, privilege or personal advantage, to any executive or judicial officer or member of the legislative assembly, to influence him in the performance of any of his official or public duties, shall be deemed guilty of bribery, and be punished in such manner as shall be provided by law.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. This subject should be regulated by statute rather than the constitution. The Council concludes that this section should be repealed and replaced by a statute.

Section 43. The offense of corrupt solicitation of members of the legislative assembly, or of public officers of the state, or of any municipal division thereof, and the occupation or practice of solicitation of such members or officers, to influence their official action, shall be defined by law, and shall be punishable by fine and imprisonment.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. Like Section 42 above, this subject should probably be regulated by statute rather than by the constitution. The Council concludes that this section should be repealed and replaced by a statute.

Section 44. A member who has a personal or private interest in any measure or bill proposed or pending before the legislative assembly, shall disclose the fact to the house of which he is a member, and shall not vote thereon.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions; only eleven other state constitutions have such provisions. If broadly interpreted and observed, this section might be virtually unworkable. Moreover, this section may be used by legislators to avoid recorded votes on controversial bills more often than to observe the conflict of interest concept. The Council concludes that this section is inadequate. It should be repealed and replaced by a statute.

Section 45. This section on legislative vacancies was repealed in 1966.

Section 46. The legislative assembly in order to insure continuity of state and local governmental operations in a period of emergency resulting from a disaster caused by enemy attack may enact laws:

(1) To provide for prompt and temporary succession to the powers and duties of elected and appointed public officers who are killed or incapacitated.

(2) To adopt other measures that may be necessary to insure the continuity of governmental operations.

Such laws shall be effective only during the emergency that affects a particular office or governmental operation, and such laws may deviate from other provisions of the Montana constitution, including but not limited to the following sections:

(1) Section 3, Article X, seat of state government.

(2) Section 2, Article XVI, seat of county governments.

(3) Section 16, Article VII, succession to governor.

(4) Section 4, Article XVI, vacancy on board of county commissioners.

(5) Section 6, Article XVI, other vacancies in county government.

(6) Section 45, Article V, vacancies in legislative assembly.

(7) Section 11, Article VII, special legislative sessions.

(8) Section 5, Article V, length of legislative session.

(9) Section 10, Article V, quorum to do business in each house.

(10) Section 6, Article XIX, location of county offices.

(11) Section 1, Article VII, duties of executive officers of state.

(12) Section 7, Article VII, appointments by governor.

COMMENT: This section was added in 1966. The Council concludes that it is adequate.

# Chapter VII
# ARTICLE VI–APPORTIONMENT AND REPRESENTATION

## Summary

All state constitutions contain provisions on apportionment and representation, and most vest the authority to reapportion in the legislature. Other states vest authority for reapportionment in the governor or in a board or commission. Judicial review of reapportionment plans is also provided by some states. For example, a proposed new constitution for Maryland gives the state supreme court original jurisdiction to review reapportionment plans upon the petition of any qualified voter and the right to grant "appropriate relief" if the plan fails to meet constitutional requirements.

After reviewing Article VI of the Montana Constitution, the Council concludes that this article is not adequate. Two sections (1 and 3) are unnecessary and should be repealed. The reference to districts composed of contiguous counties in Section 3 should be incorporated into Section 2. Moreover, Section 2 should probably be relocated in the legislative article. If two sections were repealed (revising one section to incorporate additional language if desirable) and the remaining section were relocated, this article would be deleted entirely. Detailed comments on individual sections of Article VI are shown below.

## Comments on Individual Sections of Article VI

Section 1. One representative in the congress of the United States shall be elected from the state at large, the first Tuesday in October, 1889, and thereafter at such times and places, and in such manner as may be prescribed by law. When a new appointment shall be made by congress the legislative assembly shall divide the state into congressional districts accordingly.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. Moreover, representation in Congress is completely controlled by federal law. The Council concludes that this section is unnecessary. It should be repealed.**

Section 2. (1) The senate and the house of representatives of the legislative assembly each shall be apportioned on the basis of population.

(2) The legislative assembly following each census made by the authority of the United States, shall revise and adjust the apportionment for representatives and senators on the basis of such census.

(3) At such time as the constitution of the United States is amended or interpreted to permit apportionment of one house of a state legislative assembly on factors other than population, the senate of the legislative assembly shall be apportioned on the basis of one senator for each county.

**COMMENT: This section was amended in 1966 to clearly state that representation shall be based on population, remove obsolete language, and add the third subsection. All six constitutions used for comparative purposes have provisions on reapportionment by a nonlegislative official or commission. One constitution establishes a board to make recommendations only on reapportionment. None of the six have a provision similar to subsection (3) of the above section. The Council concludes that this section is adequate, but it probably should be relocated in the legislative article.**

Section 3. Senatorial and representative districts may be altered from time to time as public convenience may require. When a senatorial or representative district shall be composed of two or more counties, they shall be contiguous, and the districts as compact as may be.

**COMMENT: This section was amended in 1966 to add the reference to senatorial districts. None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed. The reference to districts composed of contiguous counties is necessary and should be incorporated into Section 2.**

# Chapter VIII
# ARTICLE VII–EXECUTIVE DEPARTMENT


## Summary

Few issues are more controversial, yet more important if state government is to be responsive to the people and also fulfill its necessary function in the federal structure, than is the organization of the executive branch of state government. Critics of state government have long concentrated much of their attack upon the disintegrated administrative structure characteristic of most states. The disunity, primitive coordination, and lack of effective policy and administrative control existent in most state executive establishments stands in sharp contrast to the federal administrative structure and that of modern business organization. Most states do not have an adequate executive branch headed by a governor who can be held generally accountable for executing the laws of the state. Yet, the governor ultimately is held responsible for executive agencies whether or not he can exert effective control over their actions. State constitutions often provide in principle for executive leadership, but most constitutions and numerous laws based on them undermine this principle in practice.


Former Governor Joseph M. Dixon stated in 1921: "Let us nominate and elect the Chief Executive of the State, then give him full power to name his assistants in administering the various departments of the state government, and we will know exactly where to place our finger in locating blame or praise."[15] Former Governors Sam C. Ford, John W. Bonner, and Donald G. Nutter made similar statements in formal messages to the Legislative Assembly. Since 1919 six major studies of the administrative structure of Montana government have been conducted. All have reflected the need for a long-range plan of reorganization. However, few recommendations to correct obvious defects in the administrative structure have been adopted.

The Council of State Governments has summarized the broad objectives which should be sought in executive reorganization as follows:

> **In our democratic society an executive branch should be organized with two main objectives: First, it should perform with maximum effectiveness and efficiency the tasks laid upon it. Second, it should be politically responsible, in practice as well as in theory.**
>
> **Neither of these objectives can be obtained if the executive branch consists of a sprawling mass of uncoordinated agencies. The Executive should be reorganized so that it can function as a unit. The way to get unity is to establish a clear administrative hierarchy headed by a popularly elected chief executive–in this case a governor–upon whom the attention of the people can focus and from whom all administrative authority will flow. By making the governor responsible for administration and giving him authority commensurate with his responsibility, the twin goals of administrative effectiveness and political responsibility can be achieved.**[16]

Many of these broad objectives can be achieved by deleting unnecessarily restrictive provisions in state constitutions. Constitutions can also contain provisions which set the conditions for administrative integration such as a ceiling on the number of departments, executive initiative in reorganization, the item veto, the executive budget system, and others.

The Council recognizes that much improvement in administrative structure could be accomplished without constitutional revision, and only scant progress has been made in revision of Montana statutes which have fragmented executive authority. Yet, the basic framework of government is fixed by the Constitution. Revision of the executive article will not, of itself, accomplish all that is desirable in administrative reorganization. Constitutional change can, however, remove provisions which block reorganization in some areas and also set the conditions necessary for extensive changes in the future.

The Council concludes that eight of the twenty sections contained in Article VII are adequate. Five sections (3, 4, 8, 17, and 19) should be repealed. Seven sections should be revised as follows.

**Section 1. This section specifying officials who must be elected should be revised to delete reference to some officials. *At a minimum*, the constitutional status of the state treasurer should be eliminated.**

15. Joseph M. Dixon, *Message to the Seventeenth Legislative Assembly* (Helena: State Publishing Co., 1921), p. 20.

16. Quoted in Ferrel Heady, *State Constitutions: The Structure of Administration* (New York: National Municipal League, 1961), p. 4.

Section 2. This section on selection of a constitutional official by the Legislative Assembly in case of a tie vote should be revised to simplify and clarify its intent.

Section 10. This section on reporting to the Governor and Legislative Assembly should be revised extensively to simplify and clarify its provisions.

Section 11. This section should be revised to provide that the Legislative Assembly may convene itself upon petition of an extraordinary majority of its members.

Section 12. The procedure to be followed by the Governor in signing or vetoing bills contained in this section should be clarified.

Section 16. This section should be revised to provide a procedure to determine incapacity of the governor. Moreover, this section could be combined with Section 14.

Section 20. This section should be revised to delete references to the Board of State Prison Commissioners. This Board has no duties at the present time.

## Comments on Individual Sections of Article VII

Section 1. The executive department shall consist of a governor, lieutenant-governor, secretary of state, attorney general, state treasurer, state auditor and superintendent of public instruction, each of whom shall hold his office for four years, or until his successor is elected and qualified, beginning on the first Monday of January next succeeding his election, except that the terms of office of those who are elected at the first election, shall begin when the state shall be admitted into the Union, and shall end on the first Monday of January, A.D. 1893. The officers of the executive department, excepting the lieutenant-governor, shall during their terms of office reside at the seat of government, where they shall keep the public records, books and papers. They shall perform such duties as are prescribed in this constitution and by the laws of the state. The state treasurer shall not be eligible to his office for the succeeding term.

COMMENT: All six constitutions used for comparative purposes simply state that the executive power is vested in the governor. In 1963, a bill was introduced in the Senate to eliminate the constitutional status of the State Treasurer. This bill resulted from a Council recommendation to "enable the legislature to provide for a qualified, appointive official to assume responsibility for operating the state treasury and supervising investments" (see also, Montana Legislative Council, *Executive Reorganization,* Report Number 7, November 1962, p. 36 and Appendix D, p. 57). In the same report the 1963 Council noted: "(1) The governor's authority over the executive branch should be implemented by eliminating most elective officials . . . (2) with few exceptions, the governor should have powers of appointment over administrative department heads and governing boards . . ." The Council concludes that this section is not adequate. It should be revised. *At a minimum,* the constitutional status of the state treasurer should be eliminated.

Section 2. The officers provided for in section 1 of this article, shall be elected by the qualified electors of the state at the time and place of voting for members of the legislative assembly, and the persons respectively, having the highest number of votes for the office voted for shall be elected; but if two or more shall have an equal and the highest number of votes for any one of said offices, the two houses of the legislative assembly, at its next regular session, shall forthwith by joint ballot, elect one of such persons for said office. The returns of election for the officers named in section 1 shall be made in such manner as may be prescribed by law, and all contested elections of the same, other than provided for in this section, shall be determined as may be prescribed by law.

COMMENT: Five of the six constitutions used for comparative purposes mention election of constitutional officers, but only one contains a similar provision in case of a tie vote. Although adequate, the Council concludes that this section could be revised to read: "Section 2. Officers named in Section 1 of this article shall be elected at general elections. In case of a tie vote, the legislative assembly shall meet in joint session at the next regular session and select the officer by joint ballot."

Section 3. No person shall be eligible to the office of governor, lieutenant-governor, or superintendent of public instruction, unless he shall have attained the age of thirty years at the time of his election, nor to the office of secretary of state, state auditor, or state treasurer, unless he shall have attained the age of twenty-five years, nor to the office of attorney general unless he shall have attained the age of thirty years, and have been admitted to

practice in the supreme court of the state, or territory of Montana, and be in good standing at the time of his election. In addition to the qualifications above prescribed, each of the officers named shall be a citizen of the United States, and have resided within the state or territory two years next preceding his election.

**COMMENT: All six constitutions used for comparative purposes specify a minimum age for the governor (thirty or thirty-five years of age), and five of the six require state residence varying from four to seven years. The Council concludes, however, that this section is inadequate and should be repealed. If it is desirable to specify minimum age and years of residency, these could be provided for the governor and lieutenant governor only leaving qualifications for other officials to be specified by law.**

Section 4. Until otherwise provided by law, the governor, secretary of state, state auditor, treasurer, attorney general and superintendent of public instruction, shall quarterly, as due, during their continuance in office, receive for their services compensation, which is fixed as follows:

Governor, five thousand dollars per annum; Secretary of state, three thousand dollars per annum; Attorney general, three thousand dollars per annum; State treasurer, three thousand dollars per annum; State auditor, three thousand dollars per annum; Superintendent of public instruction, two thousand five hundred dollars per annum.

The lieutenant-governor shall receive the same per diem as may be prescribed by law for the speaker of the legislative assembly, to be allowed only during the sessions of the legislative assembly.

The compensation enumerated shall be in full for all services by said officers respectively rendered in any official capacity or employment whatever during their respective terms of office, and the salary of no official shall be increased during his term of office. No officer named in this section shall receive, for the performance of any official duty, any fee for his own use, but all fees fixed by law for the performance by any officer of any official duty, shall be collected in advance, and deposited with the state treasurer quarterly to the credit of the state. No officer mentioned in this section shall be eligible to, or hold any other public office, except member of the state board of education during his term of office.

**COMMENT: Four of the six constitutions used for comparative purposes have brief provisions that salaries shall be set by law, one also provides that the salaries cannot be diminished except by general law applying to all salaried officers, one also sets minimum salaries, and one also provides that the salary of the governor cannot be increased or diminished during the period for which he was elected. The Council concludes that this section is obsolete and should be repealed. The prohibition against increasing salaries of officials during their terms of office is in direct conflict with the intent of a proposed amendment to Section 31, Article V which will be voted upon in 1968.**

Section 5. The supreme executive power of the state shall be vested in the governor, who shall see that the laws are faithfully executed.

**COMMENT: All six constitutions used for comparative purposes state that the executive power is vested in the governor, but none refer to "supreme" executive power. The Council concludes, however, that this section is adequate.**

Section 6. The governor shall be commander-in-chief of the militia forces of the state, except when these forces are in the actual service of the United States, and shall have power to call out any part or the whole of said forces to aid in the execution of the laws, to suppress insurrection or to repel invasion.

**COMMENT: All six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.**

Section 7. The governor shall nominate, and by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for. If during a recess of the senate a vacancy occur in any such office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate, when he shall nominate some person to fill such office. If the office of secretary of state, state auditor, state treasurer, attorney general or superintendent of public instruction shall be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified.

COMMENT: All six constitutions used for comparative purposes provide for appointments by the governor. Four of the six provide for confirmation by the senate, one provides for confirmation by the legislature in joint session, and one only provides that officials serve at the pleasure of the governor unless otherwise provided in the constitution. The Council concludes that this section is adequate.

Section 8. The legislative assembly shall provide for a state examiner, who shall be appointed by the governor and confirmed by the senate. His duty shall be to examine the accounts of state treasurer, supreme court clerks, district court clerks, and all county treasurers and treasurers of such other public institutions as may be prescribed by law, and shall perform such other duties as the legislative assembly may prescribe. He shall report at least once a year and oftener if required to such officers as may be designated by the legislative assembly. His compensation shall be fixed by law.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that the State Examiner should not be a constitutional officer. This section should be repealed.

Section 9. The governor shall have the power to grant pardons, absolute or conditional, and to remit fines and forfeitures, and to grant commutation of punishments and respites after conviction and judgment for any offenses committed against the criminal laws of the state; Provided, however, That before granting pardons, remitting fines and forfeitures, or commuting punishments, the governor shall be advised concerning the same and that such action has been approved by a board, or a majority thereof, who shall be known as the board of pardons. The legislative assembly shall by law prescribe for the appointment and composition of said board of pardons, its powers and duties; and regulate the proceedings thereof.

COMMENT: This section was amended in 1954. Prior to amendment, the Board of Pardons was composed of the Secretary of State, Attorney General, and State Auditor. All constitutions used for comparative purposes have similar provisions, but none make this authority subject to a constitutional board. Four of the six specifically state that this authority does not extend to impeachments. Although it is questionable whether the Board of Pardons should be constitutional, the Council concludes that this section is adequate.

Section 10. The governor may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices, which information shall be given upon oath whenever so required; he may also require information in writing, at any time, under oath, from all officers and managers of state institutions, upon any subject relating to the condition, management and expenses of their respective offices and institutions, and may, at any time he deems it necessary, appoint a committee to investigate and report to him upon the condition of any executive office or state institution. The governor shall at the beginning of each session, and from time to time, by message, give to the legislative assembly information of the condition of the state, and shall recommend such measures as he shall deem expedient. He shall also send to the legislative assembly a statement with vouchers of the expenditures of all moneys belonging to the state and paid out by him. He shall also at the beginning of each session present estimates of the amount of money required to be raised by taxation for all purposes of the state.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that the purpose of this section is desirable, but it should be revised extensively.

Section 11. He may on extraordinary occasions convene the legislative assembly by proclamation, stating the purposes for which it is convened, but when so convened, it shall have no power to legislate on any subjects other than those specified in the proclamation, or which may be recommended by the governor, but may provide for the expenses of the session and other matters incidental thereto. He may also by proclamation convene the senate in extraordinary session for the transaction of executive business.

COMMENT: All six constitutions used for comparative purposes allow the Governor to call special sessions, but none restrict the legislature to subjects mentioned in the call. Three of the six also specifically authorize the legislature to call itself into special session (eleven of the fifty state constitutions have this provision). Moreover, one state which does not provide for special sessions called by the legislature does provide that the legislature is a continuous body and another (Hawaii) provides that the legislature may convene on the forty-fifth day after adjournment without call to act on bills vetoed by the governor after adjournment. The Council concludes that this section is not adequate. It should be redrafted to allow the legislature to call itself into session. This section could be amended to read: "The governor may convene a special session of the

**legislative assembly at any time and must convene a special session upon the written request of three-fourths of all the members of each house under procedures to be provided by law."**

Section 12. Every bill passed by the legislative assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it with his objections to the house in which it originated, which house shall enter the objections at large upon its journal and proceed to reconsider the bill. If then two-thirds of the members present agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present in that house it shall become a law notwithstanding the objections of the governor. In all such cases the vote of each house shall be determined by yeas and nays, to be entered on the journal. If any bill shall not be returned by the governor within five days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislative assembly shall by their adjournment prevent its return, in which case it shall not become a law without the approval of the governor. No bill shall become a law after the final adjournment of the legislative assembly, unless approved by the governor within fifteen days after such adjournment. In case the governor shall fail to approve of any bill after the final adjournment of the legislative assembly it shall be filed, with his objections, in the office of the secretary of state.

**COMMENT: All six constitutions used for comparative purposes contain similar provisions. The Council concludes that this section is adequate although it should be revised for clarification.**

Section 13. The governor shall have power to disapprove of any item or items of any bill making appropriations of money, embracing distinct items, and the part or parts approved shall become a law, and the item or items disapproved shall be void, unless enacted in the manner following: If the legislative assembly be in session he shall within five days transmit to the house in which the bill originated, a copy of the item or items thereof disapproved, together with his objections thereto, and the items objected to shall be separately reconsidered, and each item shall then take the same course as is prescribed for the passage of bills over the executive veto.

**COMMENT: All six constitutions used for comparative purposes give the governor an item veto for money bills. Five of the six allow the governor to *reduce or disapprove* money items. The power to reduce items vests additional discretion in a governor and also additional flexibility. The Council concludes that this section is adequate.**

Section 14. In case of the failure to qualify, the impeachment or conviction of felony or infamous crime of the governor, or his death, removal from office, resignation, absence from the state, or inability to discharge the powers and duties of his office, the powers, duties and emoluments of the office, for the residue of the term, or until the disability shall cease, shall devolve upon the lieutenant-governor.

**COMMENT: All six constitutions used for comparative purposes provide for succession to the office of governor, but four of the six specify an officer other than the lieutenant governor because the office does not exist. Although the phrase "absence from the state" could create problems, particularly when the Governor and Lieutenant Governor are not of the same political party, the Council concludes that this section is adequate.**

Section 15. The lieutenant-governor shall be president of the senate, but shall vote only when the senate is equally divided. In case of the absence or disqualification of the lieutenant-governor, from any cause which applies to the governor, or when he shall hold the office of governor, then the president pro tempore of the senate shall perform the duties of the lieutenant-governor until the vacancy is filled or the disability removed.

**COMMENT: Only two of the six constitutions used for comparative purposes create the office of lieutenant governor. One of the six provides that the lieutenant governor shall preside over the senate. Both constitutions that create a lieutenant governor provide for his election jointly with the governor. The Council concludes that this section is adequate.**

Section 16. In case of failure to qualify in his office, death, resignation, absence from the state, impeachment, conviction of felony or infamous crime, or disqualification from any cause, of both the governor and lieutenant-governor, the duties of the governor shall devolve upon the president pro tempore of the senate until such disqualification of either the governor or lieutenant-governor be removed, or the vacancy filled, and if the

president pro tempore of the senate, for any of the above-named causes, shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the house.

COMMENT: Section 46, Article V allows the legislature to disregard this section in providing for continuity of government in an emergency. Although adequate, the Council concludes that there should be a procedure specified to determine incapacity of the Governor. Moreover, this section could be combined with Section 14 of this article.

Section 17. The first legislative assembly shall provide a seal for the state, which shall be kept by the secretary of state and used by him officially, and known as the great seal of the state of Montana.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unecessary and should be repealed.

Section 18. All grants and commissions shall be in the name and by the authority of the state of Montana, sealed with the great seal of the state, signed by the governor, and countersigned by the secretary of state.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. Although this section may be unnecessary, the Council concludes it is adequate. If retained, this section should be revised to delete reference to the great seal.

Section 19. An account shall be kept by the officers of the executive department, and of all public institutions of the state of all moneys received by them, severally from all sources, and for every service performed, and of all moneys disbursed by them severally, and a semi-annual report thereof shall be made to the governor, under oath; they shall also, at least twenty days preceding each regular session of the legislative assembly, make full and complete reports of their official transactions to the governor, who shall transmit the same to the legislative assembly.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that these provisions should be statutory rather than constitutional and that this section should be repealed.

Section 20. The governor, secretary of state and attorney general shall constitute a board of state prison commissioners, which board shall have such supervision of all matters connected with the state prisons as may be prescribed by law. They shall constitute a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law. And no claim against the state, except for salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board. The legislative assembly may provide for the temporary suspension of the state treasurer by the governor, when the board of examiners deem such action necessary for the protection of the moneys of the state

COMMENT: A proposed amendment which would have deleted the constitutional reference to the Board of State Prison Commissioners was defeated in 1920 by a vote of 51,072 for and 72,870 against. A second proposed amendment which would have accomplished the same purpose did not appear on the ballot because of *State ex rel Livingstone v. Murray,* 137 M 557 which held that a second proposed amendment was invalid because it had not been presented to the Governor. This amendment had not been presented to the Governor and was withheld from the ballot in 1960. The Board of State Prison Commissioners have no duties prescribed by law and, therefore, no duties to perform. The Council concludes that this section should be revised to delete reference to the Board of Prison Commissioners.

# Chapter IX
# ARTICLE VIII–JUDICIAL DEPARTMENTS


## Summary

The judicial article of a constitution should have as its objective the establishment and maintenance of an effective state judiciary. It should be written as simply and concisely as possible and should, therefore, contain only those provisions necessary to create a court system, assure its independence, and provide for its effective and efficient operation.[17]


The Montana Constitution provides for a three-level court system consisting of the Supreme Court, district courts (18 districts have been established having 28 district judges), and justice of the peace and police courts. The Supreme Court has appellate jurisdiction of cases decided in the district courts and limited original jurisdiction consisting of power to issue certain extraordinary writs and exercise general supervision over the inferior courts. District courts comprise the second level of the hierarchy. These are courts of general trial jurisdiction with appellate jurisdiction in cases arising from justice and police courts. The appellate jurisdiction, however, is not limited to a review of the records from lower courts. Appeals to the district courts can result in the cases being tried anew. At the bottom of the hierarchy are justice of the peace and police courts. The jurisdiction of justice courts is limited to cases where the amount in controversy does not exceed $300, and it does not extend to cases of divorce or annulment, quieting title to property and cases in equity. Criminal jurisdiction is limited to offenses which do not constitute a felony as provided by law. Police courts have exclusive jurisdiction in proceedings for violation of municipal ordinances and also have concurrent jurisdiction with justice of the peace courts for specified offenses not of the grade of felony committed in the county where the police court is located.[18]

Most studies of court organization agree that the inferior courts, particularly justice of the peace courts, constitute the weakest link in the state court system. Justice courts are usually staffed by part-time persons with little or no legal training who are often unable to cope with the problems presented to them. Their dependence on fees for compensation presents a further obstacle to impartial justice. In Montana, there are no educational or professional qualifications for justices of the peace. The qualifications of a police judge are also minimal. After a study of justice courts in 1960, the Legislative Council recommended deletion of constitutional references to these courts. The present Council concurs in this recommendation. Except for justice courts, the basic issue is not whether various courts are needed, but whether these courts should be specifically created by the constitution. All that is actually needed in the constitution is a simple statement like that of Hawaii which reads: "The judicial power of the state shall be vested in one supreme court, circuit courts and in such inferior courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law." This brief statement outlines a unified state judicial system with authority granted to the legislature to modify the system.[19] Some additional constitutional guidelines, however, may be desirable.

A basic question regarding the judicial article is the method of selection and tenure of judges. Judges may be appointed or elected on either a partisan or nonpartisan ballot. A combination of initial appointment and voting on the question of whether a judge should be retained in office, the "Missouri Plan," may also be used. The principal features of this plan are the appointment of judges by the governor from a restricted list which is proposed by a nonpartisan nominating commission and subsequent ratification by a noncompetitive election. This approach has been recommended by the American Judicature Society, the American Bar Association, and the National Municipal League.[20]

Although judges are elected on a nonpartisan ballot in Montana, in practice many judges are appointed initially and subsequent elections are essentially on the question of whether the judge should be retained. Moreover, appointments to fill vacancies are not usually made without consultation with informed persons.

17. *Salient Issues of Constitutional Revision*, p. 115.
18. David R. Mason and William F. Crowley, *Montana's Judicial System–A Blueprint for Modernization*, unpublished memorandum, 1967, on file in Council offices.
19. *Salient Issues of Constitutional Revision*, p. 120.
20. Maryland, *Report of the Constitutional Convention Commission*, (Baltimore: King Brothers, Inc., 1967), p. 195.

A proposal to modernize the judicial article of the Montana constitution was reviewed in detail by the Council. These recommendations would: (1) clearly delineate the supervisory powers of the supreme court over the district courts; (2) clarify the administrative structure of the district courts; (3) abolish justice of the peace and police courts and place their present jurisdiction in the district courts; (4) create the office of commissioner to permit the exercise of district court functions in certain criminal matters by a specially appointed member of the bar where a district court judge cannot be made readily available; (5) permit the institution of a small claims division of the district court to provide expeditious handling of smaller civil matters which are now largely ignored; (6) permit the legislature to provide methods of selection other than election for members of the judiciary; (7) place in the supreme court primary authority to change judicial districts and determine the number of judges per district.[21] The Council also consulted with the district judges association on the judicial article. A representative of the association agreed that the quality of justice of the peace and police courts should be improved, suggesting that a lower court division replace justice of the peace courts and police courts with judges having legal training. The new lower court level could be designated district courts, and present district courts could be designated superior courts retaining essentially the same powers.

After reviewing the judicial article, and considering the proposal to modernize the state court system, the Council concludes that justice of the peace and police courts should be improved. A first step toward improvement in this court level should be deletion of references to these courts in the constitution. Discretion to establish these inferior courts, and provide for their organization, should be vested in the Legislative Assembly. The creation of a small claims division might be desirable.

The Council further concludes that constitutional references to the Clerk of the Supreme Court, County Clerks of Court, and County Attorneys should be deleted. Removal of the constitutional references to these offices would allow the legislature discretion in providing for necessary officials and introduce desirable flexibility in organization. For example, appointment of some officers on a district basis could be provided. Without making specific recommendations, the Council also concludes that an improved method of removing judges from office would also be desirable. In California, for example, a Commission on Judicial Qualifications composed of judges, attorneys, and citizens may recommend that the Supreme Court remove a judge for cause.

Following a review of Article VIII, the Council concludes that seventeen sections are adequate. Eleven sections (4, 13, 18, 19, 20, 21, 22, 23, 24, 32, and 36) should be repealed, and nine sections (1, 5, 8, 9, 11, 12, 29, 30, and 34) should be revised as follows:

**Section 1. This section should be revised to delete reference to justice of the peace courts allowing the legislature discretion to provide for lower courts by law.**

**Section 5. This section should be revised to specify that the number of Supreme Court judges should be five.**

**Section 8. This section should be revised to delete the obsolete language referring to initial elections of Supreme Court judges.**

**Section 9. Since the Clerk of the Supreme Court is the administrative officer of the Supreme Court, this section should be revised to allow appointment of the Clerk.**

**Section 11. This section on district courts should be revised by deleting the specific reference of fifty dollars for the jurisdictional amount and substituting the words "an amount to be fixed by law."**

**Section 12. This section could be revised to allow for a less cumbersome method of removing judges patterned after the California system. California established a Commission on Judicial Qualifications composed of judges, lawyers and prominent citizens who recommend to the supreme court removal of judges for cause. At a minimum, obsolete language in the section should be removed.**

**Section 29. This section on compensation of judges should be revised by deleting the requirement of payments quarterly and allowing payment in amounts and at times fixed by law.**

**Section 30. This section on expense payments to judges should be revised to allow judges to receive any type of expense payment authorized by law.**

**Section 34. This section on vacancies should be revised by deleting references to the Clerk of the Supreme Court, County Attorneys, Clerks of the district courts, and justices of the peace.**

21. *Montana's Judicial System—A Blueprint for Modernization.*

## Comments on Individual Sections of Article VIII

Section 1. The judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, and such other inferior courts as the legislative assembly may establish in any incorporated city or town.

**COMMENT: All six constitutions used for comparative purposes contain similar provisions, but none mention justice of the peace or municipal courts. Two of the constitutions specify two court levels and vest discretion in the legislature to define the jurisdiction of courts and establish inferior courts as necessary, two constitutions specify three court levels plus others established by law, one constitution specifies four court levels plus others as established by law, and one constitution provides only for a supreme court and other court levels provided by law. In 1962, an amendment which would have deleted references to justice and municipal courts was rejected. The Council concludes that this section should be revised by deleting references to justice and municipal courts vesting discretion in the legislature to establish all courts below the district court level.**

Section 2. The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law.

**COMMENT: All six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.**

Section 3. The appellate jurisdiction of the supreme court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law. Said court shall have power in its discretion to issue and to hear and determine writs of habeas corpus, mandamus, quo-warranto, certiorari, prohibition and injunction, and such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction. When a jury is required in the supreme court to determine an issue of fact, said court shall have power to summon such jury in such manner as may be provided by law. Each of the justices of the supreme court shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or the supreme court, or before any district court of the state, or any judge thereof; and such writs may be heard and determined by the justice or court, or judge, before whom they are made returnable. Each of the justices of the supreme court may also issue and hear and determine writs of certiorari in proceedings for contempt in the district court, and such other writs as he may be authorized by law to issue.

**COMMENT: Although only one of the six constitutions used for comparative purposes has a similar provision, the Council concludes that this section is adequate.**

Section 4. At least three terms of the supreme court shall be held each year at the seat of government.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary. It should be deleted.**

Section 5. The supreme court shall consist of three justices, a majority of whom shall be necessary to form a quorum or pronounce a decision, but one or more of said justices may adjourn the court from day to day, or to a day certain and the legislative assembly shall have the power to increase the number of said justices to not less nor more than five. In case any justice of the supreme court shall be in any way disqualified to sit in a cause brought before such court, the remaining justice or justices shall have power to call on one or more of the district judges of this state as in the particular case may be necessary to constitute the full number of justices of which the said court shall then be composed, to sit with them in the hearing of said cause. In all cases where a district judge is invited to sit and does sit as by this section provided, the decision and opinion of such district judge shall have the same force and effect in any cause heard before the court as if regularly participated in by a justice of the supreme court.

**COMMENT: All six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be revised to specify that the Supreme Court shall consist of five justices.**

Section 6. The justices of the supreme court shall be elected by the electors of the state at large, as hereinafter provided.

**COMMENT: Only one of the six constitutions used for comparative purposes has a similar provision. The Council concludes, however, that this section is adequate.**

Section 7. The term of office of the justices of the supreme court, except as in this constitution otherwise provided, shall be six years.

**COMMENT: Three of the six constitutions used for comparative purposes specify a fixed term for judges, two provide an initial term of seven years and upon reappointment the judges hold office during good behavior, one provides only that judges hold office during good behavior. The Council concludes that this section is adequate.**

Section 8. There shall be elected at the first general election, provided for by this constitution, one chief justice and two associate justices of the supreme court. At said first election the chief justice shall be elected to hold his office until the general election in the year one thousand eight hundred ninety-two (1892), and one of the associate justices to hold office until the general election in the year one thousand eight hundred ninety-four (1894), and the other associate justice to hold his office until the general election in the year one thousand eight hundred ninety-six (1896), and each shall hold until his successor is elected and qualified. The terms of office of said justices, and which one shall be chief justice, shall at the first and all subsequent elections be designated by ballot. After said first election one chief justice or one associate justice shall be elected at the general election every two years, commencing in the year one thousand eight hundred ninety-two (1892), and if the legislative assembly shall increase the number of justices to five, the first terms of office of such additional justices shall be fixed by law in such manner that at least one of the five justices shall be elected every two years. The chief justice shall preside at all sessions of the supreme court, and in case of his absence, the associate justice having the shortest term to serve shall preside in his stead.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be revised to delete obsolete references to the initial election of judges.**

Section 9. There shall be a clerk of the supreme court, who shall hold his office for the term of six years, except that the clerk first elected shall hold his office only until the general election in the year one thousand eight hundred ninety-two (1892), and until his successor is elected and qualified. He shall be elected by the electors at large of the state, and his compensation shall be fixed by law, and his duties prescribed by law, and by the rules of the supreme court.

**COMMENT: Two of the six constitutions used for comparative purposes refer to administrative officers; both provide for appointive officers. Court administrative officers are not policy officials and should not be elected. The Council concludes that this section should be revised to read: "The clerk of the supreme court shall be appointed by the supreme court. The term of office and compensation of the clerk shall be fixed by law."**

Section 10. No person shall be eligible to the office of justice of the supreme court, unless he shall have been admitted to practice law in the supreme court of the territory or state of Montana, be at least thirty years of age, and a citizen of the United States, nor unless he shall have resided in said territory or state at least two years next preceding his election.

**COMMENT: All six constitutions used for comparative purposes have similar provisions. Although obsolete references to the territory of Montana could be deleted, the Council concludes that this section is adequate.**

Section 11. The district courts shall have original jurisdiction in all cases at law and in equity, including all cases which involve the title or right of possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all cases in which the debt, damage, claim or demand, exclusive of interest, or the value of the property in controversy exceeds fifty dollars; and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for; of actions of forcible entry and unlawful detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate; of actions of divorce and for annulment of marriage, and for all such special actions and proceedings as are not otherwise provided for. And said courts shall have the power of naturalization, and to issue papers therefor, in all cases where they are authorized so to do by the laws of the United States. They shall have appellate jurisdiction in such cases arising in justices and other inferior courts in their respective districts as may be prescribed by law and consistent with this constitution. Their process shall extend to all parts of the state, provided that all actions for the recovery of, the possession of,

quieting the title to, or for the enforcement of liens upon real property, shall be commenced in the county in which the real property, or any part thereof, affected by such action or actions, is situated. Said courts and the judges thereof shall have power also to issue, hear and determine writs of mandamus, quo warranto. certiorari, prohibition, injunction and other original and remedial writs, and also all writs of habeas corpus on petition by, or on behalf of, any person held in actual custody in their respective districts. Injunctions, writs of prohibition and habeas corpus, may be issued and served on legal holidays and non-judicial days.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that the amount of fifty dollars should be deleted and provisions made to fix the amount by law.**

Section 12. The state shall be divided into judicial districts, in each of which there shall be elected by the electors thereof one judge of the district court, whose term of office shall be four years, except that the district judges first elected shall hold their offices only until the general election in the year one thousand eight hundred and ninety-two (1892), and until their successors are elected and qualified. Any judge of the district court may hold court for any other district judge, and shall do so when required by law.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. Although this section contains some obsolete language, the Council concludes that it is adequate.**

Section 13. Until otherwise provided by law judicial districts of the state shall be constituted as follows: First district, Lewis and Clark county; second district, Silver Bow county; third district, Deer Lodge county; fourth district, Missoula county; fifth district, Beaverhead, Jefferson and Madison counties; sixth district, Gallatin, Park and Meagher counties; seventh district, Yellowstone, Custer and Dawson counties; eighth district, Choteau, Cascade and Fergus counties.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is obsolete and should be repealed.**

Section 14. The legislative assembly may increase or decrease the number of judges in any judicial district; provided, that there shall be at least one judge in any district established by law; and may divide the state, or any part thereof, into new districts; provided, that each be formed of compact territory and be bounded by county lines, but no changes in the number or boundaries of districts shall work a removal of any judge from office during the term for which he has been elected or appointed.

**COMMENT: Although none of the six constitutions used for comparative purposes have similar provisions, the Council concludes that this section is adequate.**

Section 15. Writs of error and appeals shall be allowed from the decisions of said district courts to the supreme court under such regulations as may be prescribed by law.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate, but it is probably unnecessary.**

Section 16. No person shall be eligible to the office of judge of the district court unless he be at least twenty-five years of age and a citizen of the United States, and shall have been admitted to practice law in the supreme court of the territory or state of Montana, nor unless he shall have resided in this state or territory at least one year next preceding his election. He need not be a resident of the district for which he is elected at the time of his election, but after his election he shall reside in the district for which he is elected during his term of office.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. Although the section contains obsolete references to the Territory of Montana, the Council concludes that it is adequate.**

Section 17. The district court in each county which is a judicial district by itself shall be always open for the transaction of business, except on legal holidays and non-judicial days. In each district where two or more counties are united, until otherwise provided by law, the judges of such district shall fix the term of court, provided that there shall be at least four terms a year held in each county.

**COMMENT: Although none of the six constitutions used for comparative purposes have similar provisions, the Council concludes that this section is adequate.**

Section 18. There shall be a clerk of the district court in each county, who shall be elected by the electors of his county. The clerk shall be elected at the same time and for the same term as the district judge. The duties and compensation of said clerk shall be as provided by law.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that county officials should not be constitutional. This section should be repealed.

Section 19. There shall be elected at the general election in each county of the state one county attorney, whose qualifications shall be the same as are required for a judge of the district court, except that he must be over twenty-one years of age, but need not be twenty-five years of age, and whose term of office shall be four years, and until their successors are elected and qualified. He shall have a salary to be fixed by law, one-half of which shall be paid by the state, and the other half by the county for which he is elected, and he shall perform such duties as may be required by law.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. After two previous amendments were rejected, this section was amended in 1962 to increase the term for County Attorneys from two to four years. The Council concludes that discretion to specify county officials should be vested in the Legislative Assembly. This section should be repealed.

Section 20. There shall be elected in each organized township of each county by the electors of such township at least two justices of the peace, who shall hold their offices, except as otherwise provided in this constitution, for the term of two years. Justices' courts shall have such original jurisdiction within their respective counties as may be prescribed by law, except as in this constitution otherwise provided; provided, that they shall not have jurisdiction in any case where the debt, damage, claim or value of the property involved exceeds the sum of three hundred dollars.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. Three proposed amendments to this section, including one in 1962 which would have eliminated the constitutional status of justices of the peace, failed of approval. If county officials should not be constitutional, certainly references to township officials should not appear in the constitution. The Council concludes that this section should be repealed.

Section 21. Justices' courts shall not have jurisdiction in any case involving the title or right of possession of real property, nor in cases of divorce, nor for annulment of marriage, nor of cases in equity; nor shall they have power to issue writs of habeas corpus, mandamus, certiorari, quo warranto, injunction, or prohibition, nor the power of naturalization; nor shall they have jurisdiction in cases of felony, except as examining courts; nor shall criminal cases in said courts be prosecuted by indictment; but said courts shall have such jurisdiction in criminal matters, not of the grade of felony, as may be provided by law; and shall also have concurrent jurisdiction with the district courts in cases of forcible entry and unlawful detainer.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. In 1962 an amendment to eliminate constitutional references to justices of the peace failed of adoption. As noted above, justice of the peace courts should not have constitutional status. The Council concludes that this section should be repealed.

Section 22. Justices' courts shall always be open for the transaction of business, except on legal holidays and nonjudicial days.

COMMENT: Comment following Section 21 applies to this section.

Section 23. Appeal shall be allowed from justices' courts, in all cases, to the district courts, in such manner and under such regulations as may be prescribed by law.

COMMENT: Comment following Section 21 applies to this section.

Section 24. The legislative assembly shall have power to provide for creating such police and municipal courts and magistrates for cities and towns as may be deemed necessary from time to time, who shall have jurisdiction in all cases arising under the ordinances of such cities and towns, respectively; such police magistrates may also be constituted ex-officio justices of the peace for their respective counties.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. In 1962 an amendment which would have eliminated constitutional references to police and municipal courts failed of adoption. These courts should not be constitutional. The Council concludes that this section should be repealed.

Section 25. The supreme and district courts shall be courts of record.

COMMENT: Although only one of the six constitutions used for comparative purposes has a similar provision, the Council concludes that this section is adequate.

Section 26. All laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, shall be uniform.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes, however, that this section is adequate.

Section 27. The style of all process shall be "The State of Montana," and all prosecutions shall be conducted in the name and by the authority of the same.

COMMENT: Although none of the six constitutions used for comparative purposes have similar provisions, the Council concludes that this section is adequate.

Section 28. There shall be but one form of civil action, and law and equity may be administered in the same action.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions, but the Council concludes that this section is adequate.

Section 29. The justices of the supreme court and the judges of the district courts shall each be paid quarterly by the state, a salary, which shall not be diminished during the terms for which they shall have been respectively elected.

COMMENT: Five of the six constitutions used for comparative purposes have similar provisions. This section was amended in 1964 to allow increases in compensation during the term of office. The Council concludes that this section should be revised by deleting references to quarterly compensation payments. All judges are paid on a monthly basis.

Section 30. No justice of the supreme court nor judge of the district court shall accept or receive any compensation, fee, allowance, mileage, perquisite or emolument for or on account of his office, in any form whatever, except the salary provided by law.

COMMENT: Only one of the six constitutions used for comparative purposes has a similar provision. The Council concludes that this section should be revised by deleting the words "the salary" in line three and substituting for those words the words "as may be."

Section 31. No justice or clerk of the supreme court, nor judge or clerk of any district court shall act or practice as an attorney or counsellor at law in any court of this state during his continuance in office.

COMMENT: Only two of the six constitutions used for comparative purposes contain a similar provision. The Council concludes, however, that this section is adequate.

Section 32. The legislative assembly may provide for the publication of decisions and opinions of the supreme court.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. Permission for the Legislative Assembly to provide for publication of the *Montana Reports* is not necessary. The Council concludes that this section should be repealed.

Section 33. All officers provided for in this article, excepting justices of the supreme court, who shall reside within the state, shall respectively reside during their term of office in the district, county, township, precinct, city or town for which they may be elected or appointed.

COMMENT: Only one of the six constitutions used for comparative purposes has a similar provision. The Council concludes that this section is adequate.

Section 34. Vacancies in the office of justice of the supreme court, or judge of the district court, or clerk of the supreme court, shall be filled by appointment, by the governor of the state, and vacancies in the offices of county attorney, clerk of the district court, and justices of the peace, shall be filled by appointment, by the board of county commissioners of the county where such vacancy occurs. A person appointed to fill any such vacancy shall hold his office until the next general election and until his successor is elected and qualified. A person elected to fill a vacancy shall hold office until the expiration of the term for which the person he succeeds was elected.

**COMMENT: Only three of the six constitutions used for comparative purposes have similar provisions in the judicial article. In 1962, an amendment which would have deleted the reference to justices of the peace failed of approval. The Council concludes that the first sentence of this section should be revised to read: "Vacancies in the office of justice of the supreme court, or judge of the district court, shall be filled by appointment by the governor." The remainder of the section should not be changed.**

Section 35. No justice of the supreme court or district judge shall hold any other public office while he remains in the office to which he has been elected or appointed.

**COMMENT: All six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.**

Section 36. A civil action in the district court may be tried by a judge pro tempore, who must be a member of the bar of the state, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the cause; and in such case any order, judgment or decree, made or rendered therein by such judge pro tempore, shall have the same force and effect as if made or rendered by the court with the regular judge presiding.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be repealed.**

Section 37. Any judicial officer who shall absent himself from the state for more than sixty consecutive days shall be deemed to have forfeited his office.

**COMMENT: Although none of the six constitutions used for comparative purposes have similar provisions, the Council concludes that this section is adequate.**

# Chapter X

# ARTICLE IX–RIGHTS OF SUFFRAGE AND QUALIFICATIONS TO HOLD OFFICE

## Summary

All state constitutions contain an article on suffrage although the articles vary in length and complexity. Article IX of the Montana Constitution contains thirteen sections on suffrage and qualifications of persons to hold public office. After a review of Article IX, the Council concludes that seven of the thirteen sections are adequate, four sections (8, 10, 11, and 12) should be repealed, and two sections should be revised as follows:

**Section 2. Residence requirements for voting should be six months rather than one year.**

**Section 6. The archaic language in this section which refers only to soldiers and sailors should be replaced by a more adequate reference to all persons in the armed forces of the United States.**

## Comments on Individual Sections of Article IX

Section 1. All elections by the people shall be by ballot.

**COMMENT: None of the six constitutions used for comparative purposes have a similar provision. The Council concludes, however, that this section is adequate.**

Section 2. Every person of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all general elections and for all officers that now are, or hereafter may be, elective by the people, and, except as hereinafter provided, upon all questions which may be submitted to the vote of the people or electors: First, he shall be a citizen of the United States; second, he shall have resided in this state one year immediately preceding the election at which he offers to vote, and in the town, county or precinct such time as may be prescribed by law. If the question submitted concerns the creation of any levy, debt or liability the person, in addition to possessing the qualifications above mentioned, must also be a taxpayer whose name appears upon the last preceding completed assessment roll, in order to entitle him to vote upon such question. Provided, first, that no person convicted of felony shall have the right to vote unless he has been pardoned or restored to citizenship by the governor: provided, second, that nothing herein contained shall be construed to deprive any person of the right to vote who has such right at the time of the adoption of this constitution; provided, that after the expiration of five years from the time of the adoption of this constitution, no person except citizens of the United States shall have the right to vote.

**COMMENT: All six constitutions used for comparative purposes have similar provisions. Two of the six require one year of residency, two require six months, one requires three months, and one leaves all requirements except age to be fixed by law. This section was amended in 1914 by deletion of the word "male" to allow women to vote and was amended in 1932 to require additional qualifications for voting on questions creating a levy, debt, or liability. A presidential Commission on Registration and Voting Participation created in 1963 compiled a list of twenty-one standards for voting requirement. The Commission recommended that: (1) state residence requirements should not exceed six months; (2) local residence requirements should not exceed thirty days; and (3) new state residents should be allowed to vote for president. The Council concludes that state residency requirements should be set at six months and local residency requirements should be fixed by statute rather than by constitutional provision. The section could be amended to read as follows:**

**"Section 2. (1) Except as provided in subsections (2) and (3) of this section, a person is qualified to vote for all officers and on all questions if he:**

**(a) has attained the age of twenty-one (21) years;**

**(b) is a citizen of the United States;**

(c) has resided in this state six (6) months and in the county, municipality, or precinct the time fixed by law immediately preceding the election at which he offers to vote.

(2) To vote on the creation of a levy, debt, or liability a person must have the qualifications specified by subsection (1) of this section and must also be a taxpayer listed on the last completed assessment roll.

(3) A person convicted of a felony is not entitled to vote unless pardoned by the governor."

Section 3. For the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the state, or of the United States, nor while engaged in the navigation of the waters of the state, or of the United States, nor while a student at any institution of learning, nor while kept at any almshouse or other asylum at the public expense, nor while confined in any public prison.

COMMENT: Only two of the six constitutions used for comparative purposes have a similar provision, but the Council concludes that this section is adequate.

Section 4. Electors shall in all cases, except treason, felony or breach of peace, be privileged from arrest during their attendance at elections and in going to and returning therefrom.

COMMENT: None of the six constitutions used for comparative purposes have a similar provision. The Council concludes that this section is adequate.

Section 5. No elector shall be obliged to perform military duty on the days of election, except in time of war or public danger.

COMMENT: Although none of the six constitutions used for comparative purposes have similar provisions, the Council concludes that this section is adequate.

Section 6. No soldier, seaman or marine in the army or navy of the United States shall be deemed a resident of this state in consequence of being stationed at any military or naval place within the same.

COMMENT: Only two of the six constitutions used for comparative purposes have similar provisions. The Council concludes that the present language of this section is obsolete. It should be revised as follows:

"Section 6. No person in the armed forces of the United States shall be deemed a resident in consequence of being stationed at a military installation within the state."

Section 7. No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state at least one year next before his election or appointment.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions, but the Council concludes that this section is adequate.

Section 8. No idiot or insane person shall be entitled to vote at any election in this state.

COMMENT: Three of the six constitutions used for comparative purposes have similar sections and two additional constitutions vest authority in the legislature to exclude persons from voting because of mental incompetence. The Council concludes that this section should be repealed. Mental incompetence should be defined by statute.

Section 9. The legislative assembly shall have the power to pass a registration and such other laws as may be necessary to secure the purity of elections and guard against abuses of the elective franchise.

COMMENT: Three of the six constitutions used for comparative purposes do not have similar provisions, but the Council concludes that this section is adequate.

Section 10. All persons possessing the qualifications for suffrage prescribed by Section 2 of this article as amended and such other qualifications as the legislative assembly may by law prescribe, shall be eligible to hold the office of county superintendent of schools or any other school district office.

COMMENT: Prior to amendment in 1924, this section specifically stated that women could vote in school elections and could hold school district offices or the office of county superintendent of schools. None of the

six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary. It should be repealed.

Section 11. Any person qualified to vote at general elections and for state officers in this state, shall be eligible to any office therein except as otherwise provided in this constitution, and subject to such additional qualifications as may be prescribed by the legislative assembly for city offices and offices hereafter created.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.**

Section 12. Upon all questions submitted to the vote of the taxpayers of the state, or any political division thereof, women who are taxpayers and possessed of the qualifications for the right of suffrage required of men by this constitution, shall equally with men have the right to vote.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The effect of this section was negated by the 1914 amendment to Section 2 of this article. The Council concludes that this section should be repealed.**

Section 13. In all elections held by the people under this constitution, the person or persons who shall receive the highest number of legal votes shall be declared elected.

**COMMENT: Only one of the six constitutions used for comparative purposes has a similar provision, but the Council concludes that this section is adequate.**

# Chapter XI
# ARTICLE X–STATE INSTITUTIONS AND PUBLIC BUILDINGS


## Summary

With the exception of the general statement of Section 1, none of the six constitutions used for comparative purposes have provisions similar to those contained in the five sections in Article X of the Montana Constitution. Of the five sections in this article, three sections (1, 2, and 4) should be repealed. One section (3) should be revised, and one section (5) is adequate although it may not be necessary. If three sections of this article were repealed, the remaining sections should be relocated in other constitutional articles.


## Comments on Individual Sections of Article X

Section 1. Educational, reformatory and penal institutions, and, those for the benefit of the insane, blind, deaf and mute, soldier's home, and such other institutions as the public good may require, shall be established and supported by the state in such a manner as may be prescribed by law.

COMMENT: **The type and number of state institutions should be prescribed by statute rather than by a constitutional provision which ennumerates several specific types of institutions. The Council concludes that this section should be repealed.**

Section 2. At the general election in the year one thousand eight hundred and ninety-two, the question of permanent location of the seat of government is hereby provided to be submitted to the qualified electors of the state, and the majority of all the votes upon said question shall determine the location thereof. In case there shall be no choice of location at said election, the question of choice between the two places for which the highest number of votes shall have been cast shall be, and is hereby, submitted in like manner to the qualified electors at the next general election thereafter; provided, that until the seat of government shall have been permanently located the temporary seat of government shall be and remain at the city of Helena.

COMMENT: **This section is obsolete. The Council concludes that it should be repealed.**

Section 3. When the seat of government shall have been located as herein provided the location thereof shall not thereafter be changed, except by a vote of two-thirds of all the qualified electors of the state voting on that question at a general election at which the question of the location of the seat of government shall have been submitted by the legislative assembly.

COMMENT: **If this section is necessary, the Council concludes that it should be revised to read:**

**"Section 3. The seat of government is at Helena. The seat of government may be moved if the legislative assembly submits the question to the people and it is approved by two-thirds of all qualified electors at a general election."**

Section 4. The legislative assembly shall make no appropriations or expenditures for capitol buildings or grounds until the seat of government shall have been permanently located, as herein provided.

COMMENT: **This section is obsolete. The Council concludes that it should be repealed.**

Section 5. The several counties of the state shall provide as may be prescribed by law for those inhabitants, who, by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society.

COMMENT: **The Council concludes that this section is adequate, but it could be relocated in an article dealing with local government.**

# Chapter XII
# ARTICLE XI-EDUCATION

## Summary

This article of the Montana Constitution requires a uniform system of free public schools, establishes the public school fund and states that the fund shall "forever remain inviolate," provides for the distribution of income to the public school fund, specifies the ages of persons attending public schools, prohibits the support of sectarian institutions of learning and religious tests for admission to educational institutions, creates the State Board of Education placing the University System under the control of the Board, and contains several other miscellaneous provisions. The Council concludes that seven of the twelve sections contained in this article are adequate. Three sections (6, 10, and 11) should be repealed. If portions of these provisions are necessary, the necessary parts should be replaced by statutes. Two sections should be revised as follows:

**Section 3. This section should be changed to provide that public school fund monies may be invested under restrictions provided by law. If the fund is "inviolate" and "guaranteed by the state against loss or diversion," there is no reason to refer to methods of investment in the Constitution. Moreover, these restrictions may depress interest earnings of the school fund.**

**Section 12. This section on funds of the University System should be revised to permit investment of monies under regulations prescribed by law in the same manner as monies of the public school fund. If Sections 3 and 12 were revised as suggested, these two sections could be combined.**

## Comments on Individual Sections of Article XI

Section 1. It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free, common schools.

**COMMENT: All six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.**

Section 2. The public school fund of the state shall consist of the proceeds of such lands as have heretofore been granted, or may hereafter be granted, to the state by the general government known as school lands; and those granted in lieu of such; lands acquired by gift or grant from any person or corporation under any law or grant of the general government; and of all other grants of land or money made to the state from the general government for general educational purposes, or where no other special purpose is indicated in such grant; all estates, or distributive shares of estates that may escheat to the state; all unclaimed shares and dividends of any corporation incorporated under the laws of the state, and all other grants, gifts, devises or bequests made to the state for general educational purposes.

**COMMENT: Only one of the six constitutions used for comparative purposes has a similar provision. The Council concludes, however, that this section is adequate.**

Section 3. Such public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion, to be invested, so far as possible, in public securities within the state, including school district bonds, issued for the erection of school buildings, under the restrictions to be provided by law.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is not adequate. It should be revised to read substantially as follows:**

**"Section 3. The public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion, to be invested under restrictions provided by law."**

Section 4. The governor, superintendent of public instruction, secretary of state and attorney general shall constitute the state board of land commissioners, which shall have the direction, control, leasing and sale of the school lands of the state, and the lands granted or which may hereafter be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be prescribed by law.

COMMENT: Although none of the six constitutions used for comparative purposes have similar provisions, the Council concludes that this section is adequate.

Section 5. Ninety-five per centum (95%) of all the interest received on the school funds of the state, and ninety-five per centum (95%) of all rents received from the leasing of school lands and of all other income from the public school funds shall be apportioned annually to the several school districts of the state in proportion to the number of children and youths between the ages of six (6) and twenty-one (21) residing therein respectively, but no district shall be entitled to such distributive share that does not maintain a public free school for at least six months during the year for which such distribution is made. The remaining five per centum (5%) of all the interest received on the school funds of the state, and the remaining five per centum (5%) of all the rents received from the leasing of school lands and all other income from the public school funds, shall annually be added to the public school funds of the state and become and forever remain an inseparable and inviolable part thereof.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. This section was amended in 1920 by adding the requirements that 95 percent of income shall be distributed and 5 percent shall be placed in the permanent school fund. A proposed amendment which would have deleted the requirement that the distribution be based upon the number of pupils between 6 and 21 years of age was rejected in 1944. The Council concludes that this section is adequate.

Section 6. It shall be the duty of the legislative assembly to provide by taxation, or otherwise, sufficient means, in connection with the amount received from the general school fund, to maintain a public, free common school in each organized district in the state, for at least three months in each year.

COMMENT: All six constitutions used for comparative purposes require support of public schools, but none mention any minimum school term. Because Section 1 of this article requires public schools, the Council concludes that this section is unnecessary. It should be repealed. If a minimum school term is necessary, the term should be set by statute.

Section 7. The public free schools of the state shall be open to all children and youth between the ages of six and twenty-one years.

COMMENT: Only two of the six constitutions used for comparative purposes have similar provisions. One of these states only that public schools are open to all children; one states that state schools are open to children between the ages of 5 and 18. The Council concludes that this section is adequate.

Section 8. Neither the legislative assembly, nor any county, city, town, or school district, or other public corporations, shall ever make directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in part by any church, sect or denomination whatever.

COMMENT: Three of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.

Section 9. No religious or partisan test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; nor shall attendance be required at any religious service whatever, nor shall any sectarian tenets be taught in any public educational institution of the state; nor shall any person be debarred admission to any of the collegiate departments of the university on account of sex.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes, however, that this section is adequate.

Section 10. The legislative assembly shall provide that all elections for school district officers shall be separate from those elections at which state or county officers are voted for.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be repealed and replaced by a statute.

Section 11. The general control and supervision of the state university and the various other state educational

institutions shall be vested in a state board of education, whose powers and duties shall be prescribed and regulated by law. The said board shall consist of eleven members, the governor, state superintendent of public instruction, and attorney general, being members ex-officio; the other eight members thereof shall be appointed by the governor; subject to the confirmation of the senate, under the regulations and restrictions to be provided by law.

**COMMENT: One of the six constitutions used for comparative purposes provides for a board of regents, one provides for an appointive board of education, and one provides for an elective board of education. One of the three (Michigan) makes the governor a nonvoting ex officio member. The Council concludes that this section should be repealed and replaced by a statute if necessary.**

Section 12. The funds of the state university and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties shall be devoted to the maintenance and perpetuation of these respective institutions.

**COMMENT: Only one of the six constitutions used for comparative purposes has a similar provision. One other constitution (Alaska) states only that the university has title to all property set aside for the university or conveyed to it. The Council concludes that this section should be revised to read substantially as follows:**

**"Section 12. The various funds of the university system and of all other state institutions of learning shall forever remain inviolate and sacred to the purposes for which they were dedicated and shall be invested under such regulations as may be prescribed by law."**

# Chapter XIII
# ARTICLE XII–REVENUE AND TAXATION

## Summary

If state government is to cope with the complex problems which arise in implementing public plans and policies, it must have the flexibility to develop sound fiscal policies. What should be contained in a constitutional article on finance is summarized in the statement:

> **In its simplest form, the problem of what to include in the article on taxation and finance is a test of one's belief in our system of representative democracy. It is difficult to reconcile a position demanding a series of constitutional prohibitions or limitations upon the legislature's exercise of discretion in respect to taxation and finance with a real belief in democracy. Those who argue for constitutional checks are admitting a lack of belief in the capacity or desire of the elected representatives of the voters to establish and maintain an adequate and equitable system of financing public expenditures.**[22]

Many of the complaints about constitutional limitations converge on the issue of the legislature's power over state finances. The restrictions, including those on maximum tax rates, authority to incur debt, borrowing discretion, requirements for a popular referendum to approve taxes and debt, and the earmarking of funds, clearly impair legislative autonomy and integrity. These provisions are viewed by some as unrealistic and as hindrances to effective state government.[23]

Few, if any, provisions of the Montana constitution are more complex than those on revenue and taxation. This complexity is illustrated by extensive court cases interpreting the language. Without a very careful review of these court cases, the provisions are not readily understandable. Aside from the issue of how much discretion in taxation and finance should be vested in the Legislative Assembly, the provisions of this article could be improved markedly by clarification. Substantial changes in this article should be made only after extensive research. The Council did not conduct research on each section of this article in detail, and the following comments are directed only at determining the general adequacy of the provisions.

The Council concludes that twelve sections of this article are generally adequate. Six sections (1b, 3, 13, 14, 15, and 18) are not adequate and should be repealed. Two sections should be revised as follows:

**Section 9. References to special livestock levies should be deleted. Consideration should be given to statutory provisions for these levies.**

**Section 16. Reference to the State Board of Equalization should be deleted.**

## Comments on Individual Sections of Article XII

Section 1. The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state.

> COMMENT: **Although only three of the six constitutions used for comparative purposes have generally similar provisions, the Council concludes that this section is adequate.**

Section 1a. The legislative assembly may levy and collect taxes upon incomes of persons, firms and corporations for the purpose of replacing property taxes. These income taxes may be graduated and progressive and shall be distributed to the public schools and to the state government.

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22. Edward M. Kresky, "Taxation and Finance," *Salient Issues of Constitutional Revision*, (New York: National Municipal League, 1961), pp. 136-137.
23. William J. Keefe, "Functions and Powers of the State Legislature," *State Legislatures in American Politics*, (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1966), p. 49.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. One constitution prohibits an income tax graduated as to rate or base. This section was added by amendment in 1934. The Council concludes that this section is adequate.

Section 1b. No monies paid into the state treasury which are derived from fees, excises or license taxes relating to registration, operation or use of vehicles on the public highways or to fuels used for the propulsion of such vehicles, except fees and charges paid to the board of railroad commissioners of the state of Montana and the public service commission of Montana or its successor or successors by motor carriers pursuant to law, shall be expended for other than cost of administering laws under which such monies are derived, statutory refunds and adjustments provided therein, payment of highway obligations, cost of construction, reconstruction, maintenance and repair of public highways, roads, streets, and bridges, and expenses authorized by the state legislature for dissemination of public information relating to the public highways, roads. streets and bridges of the state of Montana and the use thereof.

COMMENT: Only one of the six constitutions used for comparative purposes earmarks funds for highway purposes. This section was added by amendment in 1956. Discussing earmarked funds in 1962, the Legislative Council stated: "As a means of allocating resources, earmarking is inefficient because it fails to recognize relativity of needs. Resources are distributed, not by a conscious evaluation of the needs of all agencies, but by arbitrary constitutional and statutory formulas. A dedicated revenue tends to create a vested interest in continuing arrangements, which experience and passage of time may prove to be contrary to the public interest. Even if there be at first a proper relation between the proceeds of a given tax and the need for expenditure for a given service, there is no reason to assume that the relationship will continue to exist. Experience demonstrates that once a dedicated fund has been set up it is extremely difficult to deal with on its merits." (See also, Montana Legislative Council, *State Treasury Fund Structure,* Report No. 9, December 1962, p. xi.) The Council concurs in this conclusion. This section should be repealed.

Section 2. The property of the United States, the state, counties, cities, towns, school districts, municipal corporations and public libraries shall be exempt from taxation; and such other property as may be used exclusively for the agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, institutions of purely public charity and evidences of debt secured by mortgages of record upon real or personal property in the state of Montana, may be exempt from taxation.

COMMENT: Two of the six constitutions used for comparative purposes have similar provisions. One provides only that exemptions may be granted only by general laws. This section was amended in 1918 to exempt mortgages on real and personal property in Montana from taxation. The Council concludes that this section is adequate.

Section 3. All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as provided by law.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be repealed.

Section 4. The legislative assembly shall not levy taxes upon the inhabitants or property in any county, city, town, or municipal corporation for county, town, or municipal purposes, but it may by law invest in the corporate authorities thereof powers to assess and collect taxes for such purposes.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes, however, that this section is adequate.

Section 5. Taxes for city, town and school purposes may be levied on all subjects and objects of taxation, but the

assessed valuation of any property shall not exceed the valuation of the same property for state and county purposes.

COMMENT: Although none of the six constitutions used for comparative purposes have similar provisions, the Council concludes that this section is adequate.

Section 6. No county, city, town or other municipal corporation, the inhabitants thereof nor the property therein, shall be released or discharged from their or its proportionate share of state taxes.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is adequate.

Section 7. The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on real and personal property owned or used by them and not by this constitution exempted from taxation.

COMMENT: Three of the constitutions used for comparative purposes provide that the power of taxation shall never be suspended. The Council concludes that this section is adequate.

Section 8. Private property shall not be taken or sold for the corporate debts of public corporations, but the legislative assembly may provide by law for the funding thereof, and shall provide by law for the payment thereof, including all funded debts and obligations, by assessment and taxation of all private property not exempt from taxation within the limits of the territory over which such corporations respectively have authority.

COMMENT: Although none of the six constitutions used for comparative purposes have similar provisions, the Council concludes that this section is adequate.

Section 9. The rate of taxation on real and personal property for state purposes, except as hereinafter provided, shall never exceed two and one-half mills on each dollar of valuation; and whenever the taxable property of the state shall amount to six hundred million dollars ($600,000,000.00) the rate shall never exceed two (2) mills on each dollar of valuation, unless the proposition to increase such rate, specifying the rate proposed and the time during which the rate shall be levied shall have been submitted to the people at the general election and shall have received a majority of all votes cast for and against it at such election; provided, that in addition to the levy for state purposes above provided for, a special levy in addition may be made on live stock for the purpose of paying bounties on wild animals and for stock inspection, protection and indemnity purposes, as may be prescribed by law, and such special levy shall be made and levied annually in amount not exceeding four mills on the dollar by the state board of equalization, as may be provided by law.

COMMENT: Only one of the six constitutions used for comparative purposes has a similar provision. This section was amended in 1910 by changes in the tax rates and the value of taxable property. The Council concludes that this section should be revised by deleting references to livestock levies. Consideration should be given to fixing livestock levies by statute.

Section 10. All taxes levied for state purposes shall be paid into the state treasury, and no money shall be drawn from the treasury but in pursuance of specific appropriations made by law.

COMMENT: All six constitutions used for comparative purposes contain similar provisions. The Council concludes that this section is adequate.

Section 11. Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

COMMENT: Four of the six constitutions used for comparative purposes contain generally similar provisions. The Council concludes that this section is adequate.

Section 12. No appropriation shall be made nor any expenditures authorized by the legislative assembly whereby the expenditures of the state during any fiscal year shall exceed the total tax then provided for by law, and applicable to such appropriation or expenditure, unless the legislative assembly making such appropriation shall provide for levying a sufficient tax, not exceeding the rate allowed in section nine (9) of this article, to pay such appropriations or expenditures within such fiscal year. This provision shall not apply to appropriations or

expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war. No appropriation of public moneys shall be made for a longer term than two years.

**COMMENT: Only one of the six constitutions used for comparative purposes contains a similar provision, but the Council concludes that this section is adequate.**

Section 13. The state treasurer shall keep a separate account of each fund in his hands, and shall at the end of each quarter of the fiscal year report to the governor in writing, under oath, the amount of all moneys in his hands to the credit of every such fund, and the place or places where the same is kept or deposited, and the number and amount of every warrant paid or redeemed by him during the quarter. The governor, or other person or persons authorized by law, shall verify said report and cause the same to be immediately published in at least one newspaper printed at the seat of government, and otherwise as the legislative assembly may require. The legislative assembly may provide by law further regulations for the safekeeping and management of the public funds in the hands of the treasurer; but notwithstanding any such regulations, the treasurer and his sureties shall in all cases be held responsible therefor.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary. It should be repealed and replaced by a statute.**

Section 14. The governor, state auditor and state treasurer are hereby constituted a state depository board with full power and authority to designate depositories with which all funds in the hands of the state treasurer shall be deposited, and at such rate of interest as may be prescribed by law. When money shall have been deposited under direction of said depository board and in accordance with the law, the treasurer shall not be liable for loss on account of any such deposit occurring through damage by the elements or for any other cause or reason occasioned through means other than his own neglect, fraud or dishonorable conduct. The making of profit out of public moneys, or using the same for any purpose not authorized by law, by the state treasurer or by any other public officer, shall be deemed a felony, and shall be punished as provided for by law and part of such punishment shall be disqualification to hold any public office.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be repealed and replaced by a statute.**

Section 15. The board of county commissioners of each county shall constitute the county board of equalization. The duties of such board shall be to adjust and equalize the valuation of taxable property within their respective counties, and all such adjustments and equalizations may be supervised, reviewed, changed, increased or decreased by the state board of equalization. The state board of equalization shall be composed of three members who shall be appointed by the governor, by and with the advice and consent of the senate. A majority of the members of the state board of equalization shall constitute a quorum. The term of office of one of the members first appointed shall end on March 1st, 1925, of another first appointed on March 1st, 1927, and of the third first appointed on March 1st, 1929. Each succeeding member shall hold his office for the term of six years, and until his successors shall have been appointed and qualified. In case of a vacancy the person appointed to fill such vacancy shall hold office for the unexpired term in which the vacancy occurs. The qualifications and salaries of the members of the state board of equalization shall be as provided by law, provided, however, that such members shall be so selected that the board will not be composed of more than two persons who are affiliated with the same political party or organization; provided, further, that each member shall devote his entire time to the duties of the office and shall not hold any position of trust or profit, or engage in any occupation or business interfering or inconsistent with his duties as a member of such board, or serve on or under any committee of any political party or organization, or take part, either directly or indirectly, in any political campaign in the interest of any political party or organization or candidate for office. The state board of equalization shall adjust and equalize the valuation of taxable property among the several counties, and the different classes of taxable property in any county and in the several counties and between individual taxpayers; supervise and review the acts of the county assessors and county boards of equalization; change, increase, or decrease valuations made by county assessors or equalized by county boards of equalization; and exercise such authority and do all things necessary to secure a fair, just and equitable valuation of all taxable property among counties, between the different classes of property, and between individual taxpayers. Said state board of equalization shall also have such other powers, and perform such other duties relating to taxation as may be prescribed by law.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. This section**

was amended in 1916 and 1922 to provide for county boards of equalization and the State Board of Equalization. The Council concludes that this section should be repealed and portions replaced by statute.

Section 16. All property shall be assessed in the manner prescribed by law except as is otherwise provided in this constitution. The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization and the same shall be apportioned to the counties, cities, towns, townships and school districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities, towns, townships and school districts.

COMMENT: Four of the six constitutions used for comparative purposes have generally similar provisions, but none mention property operated in more than one county. The Council concludes that this section should be revised by substituting the words "as provided by law" for the words "by the state board of equalization."

Section 17. The word property as used in this article is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state and has been taxed.

COMMENT: Although none of the six constitutions used for comparative purposes have similar provisions, the Council concludes that this section is adequate.

Section 18. The legislative assembly shall pass all laws necessary to carry out the provisions of this article.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be repealed.

# Chapter XIV
# ARTICLE XIII–PUBLIC INDEBTEDNESS

## Summary

Limitations on the debt incurring powers of the legislature and local governments limit the state in developing sound fiscal policies. Yet, all but a handful of states have some form of limitation on the debt incurring powers of the legislature.[24] One of the most common type of debt limitations is setting a ceiling on the amount of a debt a state may incur. Often this type of limitation is expressed as a percentage of the assessed valuation of taxable property.[25] Montana limits the state general obligation debt to one hundred thousand dollars. To incur a debt in excess of this constitutional amount requires a popular referendum. In such cases, "voters usually pass judgment on the creation of a new state debt without full knowledge of the fiscal issues involved."[26]

Most state constitutions, including that of Montana, also contain limitations on the power of local governments to contract indebtedness. A common method of limitation is restricting a local debt by fixing it at a percentage of the assessed valuation of taxable real property. This type of debt limitation disregards considerations such as whether the community is in a state of growth or decline, levels of state aid, and inherent physical and commercial resources.[27] Such a system is negative and may do little to promote sound fiscal management.

Article XIII of the Montana Constitution establishes the conditions under which the state and its localities must operate in incurring a state or local debt. It limits the state to debt of $100,000 without submitting a referendum to the people; it sets the limits of a local debt at five percent of the value of taxable property in that unit; and it prohibits a state or local unit from contracting a debt on behalf of a private agency.

Of the six sections contained in Article XIII, the Council concludes that four (1, 3, 4, and 6) are adequate. Section 2 should be revised to allow the state to contract a debt of at least $1 million without submitting a referendum to the people, and the limitation of $10,000 on county debt without voter approval should be removed from Section 5 leaving this amount to be fixed by law.

## Comments on Individual Sections of Article XIII

Section 1. Neither the state, nor any county, city, town, municipality, nor other subdivision of the state shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or a joint owner with any person, company or corporation, except as to such ownership as may accrue to the state by operation or provision of law.

**COMMENT: Two of the six constitutions used for comparative purposes have similar sections. The Council concludes that this section is adequate.**

Section 2. The legislative assembly shall not in any manner create any debt except by law which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged; such law shall specify the purpose to which the funds so raised shall be applied and provide for the levy of a tax sufficient to pay the interest on, and extinguish the principal of such debt within the time limited by such law for the payment thereof; but no debt or liability shall be created which shall singly, or in the aggregate with any existing debt or liability, exceed the sum of one hundred thousand dollars ($100,000) except in case of war, to repel invasion or suppress insurrection, unless the law authorizing the same shall have been submitted to the people at a general election and shall have received a majority of the votes cast for and against it at such election.

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24. Richard Edwards (ed.), *Index Digest of State Constitutions* (New York: Legislative Drafting Research Fund of Columbia University, 1959), pp. 944-945.
25. *Salient Issues of Constitutional Revision*, p. 141.
26. *Ibid*, p. 142.
27. Raymond J. Broderick, *Local Government*, Reference Manual Number Four, (Pennsylvania Constitutional Convention: Pennsylvania, 1967), pp. 61-67.

COMMENT: Only one of the six constitutions used for comparative purposes (Alaska) requires ratification of a debt by the people, and this constitution does not impose a limit on indebtedness. Two of the six constitutions (Michigan and New Jersey) limit new indebtedness to a percentage of appropriations during a fixed period, one constitution sets a specific limit on indebtedness (Hawaii, $60 million), and two constitutions leave debt to the discretion of the legislature. The Council concludes that the limit of $100,000, fixed in 1889, should be increased to at least $1 million and the entire section should be clarified.

Section 3. All moneys borrowed by or on behalf of the state or any county, city, town, municipality or other subdivision of the state, shall be used only for the purpose specified in the law authorizing the loan.

COMMENT: Only two of the six constitutions used for comparative purposes have similar provisions, but the Council concludes that this section is adequate.

Section 4. The state shall not assume the debt, or any part thereof, of any county, city, town or municipal corporation.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions, but the Council concludes that this section is adequate.

Section 5. No county shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five (5) per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such county shall be void. No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law.

COMMENT: Only one of the six constitutions used for comparative purposes has a similar provision. Hawaii limits the indebtedness of any political subdivision to ten percent of its *assessed* value. Alaska requires approval by the people for debts contracted for capital improvements. In 1950 an amendment which would have substituted "the sum set by law" for the fixed amount of $10,000 was rejected. The Council concludes that if $10,000 was a reasonable amount in 1889, it certainly is unrealistic today. This section should be amended by deleting the fixed amount of $10,000 and leaving this limit to be fixed by law.

Section 6. No city, town, township, school district or high school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum (5%) of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township, school district or high school district shall be void; and each school district and each high school district shall have separate and independent bonding capacities within the limitation of this section; provided, however, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions (see COMMENT following Section 5 above for Alaska and Hawaii restrictions on *all* political subdivisions). In 1950 this section was amended to increase the indebtedness of three to five percent of the value of taxable property, and in 1958 it was again amended to allow separate bonding capacities for school districts and high school districts. Although the Council concludes that this section is adequate, consideration might be given to allowing an increase in the debt limitations if approved by two successive legislative sessions.

# Chapter XV
# ARTICLE XIV–MILITARY AFFAIRS

## Summary

All state constitutions provide for the establishment of a militia and designate the governor as commander-in-chief. The Governor may use the militia to "aid in the execution of the laws, to suppress insurrection, or to repel invasion" under Section 6, Article VII of the Montana Constitution. Designating the Governor as commander-in-chief insures that the military shall at all times be under the control of civil power.

After a review of Article XIV, the Council concludes that a state militia is desirable, but an entire constitutional article should not be devoted to military affairs. The requirement contained in Section 3 that the legislature appropriate funds for the militia should be relocated in the legislative article (Article V) if this provision is necessary. Sections 1, 2, 4, and 5 are unnecessary and should be repealed.

## Comments on Individual Sections of Article XIV

Section 1. The militia of the state of Montana shall consist of all able-bodied male citizens of the state between the ages of eighteen (18) and forty-five (45) years inclusive, except such persons as may be exempted by the laws of the state or of the United States.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be repealed.**

Section 2. The legislative assembly shall provide by law for the organization, equipment, and discipline of the militia, and shall make rules and regulations for the government of the same. The organization shall conform as nearly as practicable to the regulations for the government of the armies of the United States.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.**

Section 3. The legislative assembly shall provide by law for maintaining the militia, by appropriations from the treasury of the state.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that if this section is necessary, it should be relocated in the legislative article.**

Section 4. The legislative assembly shall provide by law for the safe keeping of the public arms, military records, relics and banners of the state.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be repealed and replaced by a statute if necessary.**

Section 5. When the governor shall, with the consent of the legislative assembly, be out of the state in time of war, at the head of any military force thereof, he shall continue commander-in-chief of all the military forces of the state.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.**

# Chapter XVI
# ARTICLE XV–CORPORATIONS OTHER THAN MUNICIPAL

## Summary

Following a review of the California constitutional article on corporations and public utilities, it was noted that those sections did ". . . not form a coherent, necessary, or even very useful scheme. Many sections are ambiguous and produce wasteful litigation and other difficulties of interpretation. Others are simply obsolete. Many could be eliminated without changing the state of the law. Quite a few would be appropriate as statutes but can make no honest claim to constitutional stature. Only a few sections deserve to be considered for a new, modern state constitution."[28] Most, if not all, of the comments could be applied to Article XV of the Montana Constitution. The twenty sections of Article XV reflect the late nineteenth century attitude toward corporations and reflect a desire to control corporations in general and railroads in particular. Many of the sections in Article XV were designed for the conditions existing at the time the Constitution was drafted. This article has certainly not been changed to adapt it to the present.

The Council concludes that five of the existing twenty sections in Article XV are adequate (4, 10, 11, 16, and 18), thirteen sections (1, 3, 5, 6, 7, 8, 9, 12, 13, 15, 17, 19, and 20) should be repealed possibly replacing some constitutional provisions with statutes, and two sections should be revised. These are:

**Section 2. This section on special legislation applying to corporations should be incorporated into Section 26, Article V with other provisions on special legislation.**

**Section 14. This section on telephone and telegraph lines, if necessary, should be revised. *At a minimum,* the provision prohibiting purchase of competing lines should be deleted.**

## Comments on Individual Sections of Article XV

Section 1. All existing charters, or grants of special or exclusive privileges, under which the corporations or grantees shall not have organized or commenced business in good faith at the time of the adoption of this constitution, shall thereafter have no validity.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is obsolete and should be repealed.**

Section 2. No charter of incorporations shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be under the control of the state; but the legislative assembly shall provide by general law for the organization of corporations hereafter to be created; provided, that any such laws shall be subject to future repeal or alteration by the legislative assembly.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. Although adequate, the Council concludes that this section should be incorporated into Section 26, Article V with other provisions on special legislation.**

Section 3. The legislative assembly shall have the power to alter, revoke or annul any charter of incorporation existing at the time of the adoption of this constitution,or which may be hereafter incorporated, whenever in its opinion it may be injurious to the citizens of the state.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary. It should be repealed.**

Section 4. The legislative assembly shall provide by law that in all elections for directors or trustees of incorporated companies, every stockholder shall have the right to vote in person or by proxy the number of shares of stock

28. California Constitution Revision Commission, *Proposed Revision of the California Constitution* (San Francisco: State of California, 1968), p. 85.

owned by him for as many persons as there are directors or trustees to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit, and such directors or trustees shall not be elected in any other manner.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes, however, that this section is adequate.**

Section 5. All railroads shall be public highways, and all railroad, transportation and express companies shall be common carriers and subject to legislative control, and the legislative assembly shall have the power to regulate and control by law the rates of charges for the transportation of passengers and freight by such companies as common carriers from one point to another in the state. Any association or corporation, organized for the purpose, shall have the right to construct and operate a railroad between any designated points within this state and to connect at the state line with railroads of other states and territories. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.**

Section 6. No railroad corporation, express or other transportation company, or the lessees or managers thereof, shall consolidate its stock, property or franchises, with any other railroad corporation, express or other transportation company, owning or having under its control a parallel or competing line; neither shall it in any manner unite its business or earnings with the business or earnings of any other railroad corporation; nor shall any officer of such railroad, express or other transportation company act as an officer of any other railroad, express, or other transportation company owning or having control of a parallel or competing line.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.**

Section 7. All individuals, associations, and corporations shall have equal rights to have persons or property transported on and over any railroad, transportation or express route in this state. No discrimination in charges or facilities for transportation of freight or passengers of the same class shall be made by any railroad, or transportation, or express company, between persons or places within this state; but excursion or commutation tickets may be issued and sold at special rates, provided such rates are the same to all persons. No railroad or transportation, or express company shall be allowed to charge, collect, or receive, under penalties which the legislative assembly shall prescribe, any greater charge or toll for the transportation of freight or passengers to any place or station upon its route or line, than it charges for the transportation of the same class of freight or passengers to any more distant place or station upon its route or line within this state. No railroad, express, or transportation company, nor any lessee, manager, or other employee thereof, shall give any preference to any individual, association or corporation, in furnishing cars or motive power, or for the transportation of money or other express matter.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be repealed.**

Section 8. No railroad, express, or other transportation company, in existence at the time of the adoption of this constitution, shall have the benefit of any future legislation, without first filing in the office of the secretary of state an acceptance of the provisions of this constitution in binding form.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is obsolete and should be repealed.**

Section 9. The right of eminent domain shall never be abridged, nor so construed as to prevent the legislative assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals; and the police powers of the state shall never be abridged, or so construed, as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the state.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.**

Section 10. No corporation shall issue stocks or bonds, except for labor done, services performed, or money and property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding a majority of the stock first obtained at a meeting held after at least thirty days notice given in pursuance of law.

**COMMENT: Although none of the six constitutions used for comparative purposes have similar provisions, the Council concludes that this section is adequate.**

Section 11. No foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served. And no company or corporation formed under the laws of any other country, state or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state.

**COMMENT: Only one of the six constitutions used for comparative purposes has a somewhat similar provision. The Council concludes, however, that this section is adequate.**

Section 12. No street or other railroad shall be constructed within any city or town without the consent of the local authorities having control of the street or highway proposed to be occupied by such street or other railroad.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.**

Section 13. The legislative assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already passed.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be repealed.**

Section 14. Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct or maintain lines of telegraph or telephone within this state, and connect the same with other lines; and the legislative assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section. No telegraph or telephone company shall consolidate with, or hold a controlling interest in, the stock or bonds of any other telegraph or telephone company owning or having control of a competing line, or acquire by purchase or otherwise, any other competing line of telegraph or telephone.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that if this section is necessary, it should be revised. *At a minimum,* the second sentence should be deleted.**

Section 15. If any railroad, telegraph, telephone, express or other corporation or company organized under any of the laws of this state, shall consolidate, by sale or otherwise, with any railroad, telegraph, telephone, express, or other corporation, organized under any of the laws of any other state or territory of the United States, the same shall not thereby become a foreign corporation, but the courts of this state shall retain jurisdiction over that part of the corporate property within the limits of the state, in all matters that may arise as if said consolidation had not taken place.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.**

Section 16. It shall be unlawful for any person, company or corporation to require of its servants or employees, as a condition of their employment or otherwise, any contract or agreement whereby such persons, company or corporation, shall be released or discharged from liability or responsibility on account of personal injuries received by such servants or employees while in the service of such person, company or corporation, by reason of negligence of such person, company or corporation or the agents or employees thereof; and such contracts shall be absolutely null and void.

COMMENT: Although none of the six constitutions used for comparative purposes have similar provisions, the Council concludes that this section is adequate.

Section 17. The legislative assembly shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.

Section 18. The term "corporation," as used in this article, shall be held and construed to include all associations and joint stock companies, having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships; and all corporations shall have the right to sue, and shall be subject to be sued in all courts in like cases as natural persons, subject to such regulations and conditions as may be prescribed by law.

COMMENT: Although none of the six constitutions used for comparative purposes have similar provisions, the Council concludes that this section is adequate.

Section 19. Dues from private corporations shall be secured by such means as may be prescribed by law.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.

Section 20. No incorporation, stock company, person or association of persons in the state of Montana, shall directly, or indirectly, combine or form what is known as a trust, or make any contract with any person, or persons, corporation, or stock company, foreign or domestic, through their stockholders, trustees, or in any manner whatever, for the purpose of fixing the price, or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people. The legislative assembly shall pass laws for the enforcement thereof by adequate penalties to the extent, if necessary for that purpose, of the forfeiture of their property and franchises, or in case of foreign corporations, prohibiting them from carrying on business in the state.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be repealed and replaced by a statute if necessary.

# Chapter XVII
# ARTICLE XVI–COUNTIES - MUNICIPAL CORPORATIONS AND OFFICES

## Summary

If local governments are to meet the increasingly complex problems of a modern society, the framework of local government must be flexible. Detailed, specific, and restrictive constitutional provisions will only prevent the flexibility that is needed in the organization of local government. The problem posed by constitutional provisions has been defined as " . . . a practical matter of trying to secure to the people of the communities that degree of control over local matters which is needed for effective local government and which, at the same time, is compatible with the responsibilities of the state."[29] A New York commission set down three basic requirements for a local government article in a modern constitution:

1. It should promote local self-government by providing for a broad unambiguous grant of power to local governments that will stimulate initiative and vigor in meeting new and expanding responsibilities.
2. It should permit maximum intergovernmental cooperation in meeting problems that cannot be handled properly by each local government acting alone.
3. It should free the legislature of the burden of acting on hosts of local bills so that it may concentrate on matters of importance to the whole state.[30]

It is generally agreed by students of state-local relations that the legislature should be free to set rules for local governments by general laws. Thus, little or nothing should be included in a constitution specifying the form and structure of local government. If the state wishes to use local governments to solve emerging problems of regionalism, the constitution should not bar or unduly delay the creation of effective local governments. The issue has been clearly defined by the Chamber of Commerce of the United States in the statement that: "Unless local government is revitalized, our political and economic systems, as we now know them, will have little chance to solve public problems effectively. Governments of yesteryear must be remodeled to fit not only today's, but also tomorrow's needs."[31]

Acceptance of the principle that a constitution should contain minimal provisions on the form and structure of local governments, however, may leave the central issue of the powers of local governments unanswered. In most states the "Dillon Rule" governs which states:

> It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation - not simply convenient but indispensable.[32]

An alternative approach advanced by the American Municipal Association would endow local governments by constitutional provision with all lawmaking powers not denied by general legislative statute. Thus, the local government would have the power to act unless it had been specifically denied.

The desirable constitutional provisions, if any, specifying the structure and form of local government can be determined only after extensive research and discussion of the many alternatives. Moreover, only detailed research can reveal whether it would be desirable to vest in local governments all powers not denied to them by legislative statute. The Council cannot reach definite conclusions on these points at this time. After a review of Article XVI, however, the Council concludes that changes should be made to introduce additional flexibility into present provisions. References to all county officials should be removed from the constitution, and authority to specify

29. Edward M. Kreskv. "Local Government," *Salient Issues of Constitutional Revision,* (New York: National Municipal League, 1961), p. 150.
30. *Ibid.*
31. Chamber of Commerce of the United States, *Modernizing Local Government,* (Washington, D.C.: Chamber of Commerce of the United States, 1967), p. 6.
32. Quoted in, Maryland, *Report of the Constitutional Convention Commission,* (Baltimore: King Brothers, Inc., 1967), p. 245.

county officers should be vested in the Legislative Assembly. The Council concludes that two sections (2 and 7) in Article XVI are adequate. Five sections (1, 3, 4, 5, and 6) should be repealed, and one section should be revised as follows:

**Section 8. This section prohibiting the abandonment or consolidation of a county without approval by the voters in each county affected should be combined with Section 2 of Article XVI.**

## Comments on Individual Sections of Article XVI

Section 1. The several counties of the territory of Montana, as they shall exist at the time of the admission of the state into the Union, are hereby declared to be the counties of the state until otherwise established or changed by law.

**COMMENT: None of the six constitutions used for comparative purposes have provisions directly comparable to this section. The Council concludes that this section is obsolete and should be repealed.**

Section 2. The legislative assembly shall have no power to remove the county seat of any county, but the same shall be provided for by general law; and no county seat shall be removed unless a majority of the qualified electors of the county, at a general election on a proposition to remove the county seat, shall vote therefor; but no such proposition shall be submitted oftener than once in four years.

**COMMENT: Although only one of the six constitutions used for comparative purposes has a similar provision, the Council concludes that this section is adequate.**

Section 3. In all cases of the establishment of a new county it shall be held to pay its ratable proportion of all then existing liabilities of the county or counties from which it is formed, less the ratable proportion of the value of the county buildings and property of the county or counties from which it is formed; provided, that nothing in this section shall prevent the re-adjustment of county lines between existing counties.

**COMMENT: None of the six constitutions used for comparative purposes have provisions directly comparable to this section. The Council concludes that this section should be repealed. If such a provision is necessary, it should be statutory rather than constitutional.**

Section 4. In each county there shall be elected three county commissioners, whose term of office shall be six years; provided that each county in the state of Montana shall be divided into three commissioner districts, to be designated as commissioner districts, numbers one, two and three, respectively.

The board of county commissioners shall in every county in the state of Montana, at their regular session, on the first Monday in May, 1929, or as soon thereafter as convenient or possible, not exceeding sixty days thereafter, meet and by and under the direction of the district court judge or judges of said county, divide their respective counties into three commissioner districts as compact and equal in population and area as possible, and number them respectively, one, two and three, and when such division has been made, there shall be filed in the office of the county clerk and recorder of such county, a certificate designating the metes and bounds of the boundary lines and limits of each of said commissioners districts, which certificate shall be signed by said judge or judges; provided, also that at the first regular session of any newly organized and created county, the said board of county commissioners, by and under the direction of the district court judge or judges of said county, shall divide such new county into commissioner districts as herein provided.

Upon such division, the board of county commissioners shall assign its members to such districts in the following manner; each member of the said board then in service shall be assigned to the district in which he is residing or the nearest thereto; the senior member of the board in service to be assigned to the commissioner district No. 1, the next member in seniority to be assigned to commissioner district No. 2, and the junior member of the board to be assigned to commissioner district No. 3; provided, that at the first general election of any newly created and organized county, the commissioner for district No. 1, shall be elected for two years, for No. 2, for four years, and for No. 3, for six years, and biennially thereafter there shall be one commissioner elected to take place of the retiring commissioner, who shall hold his office for six years.

That the board of county commissioners by and under the direction of the district court judge or judges of said county, for the purpose of equalizing in population and area such commissioner districts, may change the

boundaries of any or all of the commissioner districts in their respective county, by filing in the office of the county clerk and recorder of such county, a certificate signed by said judge or judges designating by metes and bounds the boundary lines of each of said commissioner districts as changed, and such change in any or all the districts in such county, shall become effective from and after filing of such certificate; provided, however, that the boundaries of no commissioner district shall at any time be changed in such a manner as to affect the term of office of any county commissioner who has been elected, and whose term of office has not expired; and provided, further, that no change in the boundaries of any commissioner district shall be made within six months next preceding a general election.

At the general election to be held in 1930, and thereafter at each general election, the member or members of the board to be elected, shall be selected from the residents and electors of the district or districts in which the vacancy occurs, but the election of such member or members of the board shall be submitted to the entire electorate of the county, provided, however, that no one shall be elected as a member of said board, who has not resided in said district for at least two years next preceding the time when he shall become a candidate for said office.

When a vacancy occurs in the board of county commissioners the judge or judges of the judicial district in which the vacancy occurs, shall appoint someone residing in such commissioner district where the vacancy occurs, to fill the office until the next general election when a commissioner shall be elected to fill the unexpired term.

**COMMENT: Only one of the six constitutions used for comparative purposes has a provision somewhat similar to this section. The section was amended in 1902 to increase the term of County Commissioners from four to six years and amended in 1928 to establish commissioner districts. The Council concludes that this section is statutory rather than constitutional in nature. This section should be repealed and replaced by a statute.**

Section 5. There shall be elected in each county the following county officers who shall possess the qualifications for suffrage prescribed by Section 2 of Article IX of this constitution and such other qualifications as may be prescribed by law:

One county clerk who shall be clerk of the board of county commissioners and ex-officio recorder; one sheriff; one treasurer, who shall be collector of the taxes, provided, that the county treasurer, shall not be eligible to his office for the succeeding term; one county superintendent of schools; one county surveyor; one assessor; one coroner; one public administrator. Persons elected to the different offices named in this section shall hold their respective offices for the term of four (4) years, and until their successors are elected and qualified. Vacancies in all county, township and precinct offices, except that of county commissioners, shall be filled by appointment by the board of county commissioners, and the appointee shall hold his office until the next general election; provided, however, that the board of county commissioners of any county may, in its discretion, consolidate any two or more of the within named offices and combine the powers and the duties of the said offices consolidated; however, the provisions hereof shall not be construed as allowing one (1) office incumbent to be entitled to the salaries and emoluments of two (2) or more offices; provided, further, that in consolidating county offices, the board of county commissioners shall, six (6) months prior to the general election held for the purpose of electing the aforesaid offices, make and enter an order, combining any two (2) or more of the within named offices, and shall cause the said order to be published in a newspaper, published and circulated generally in said county, for a period of six (6) weeks next following the date of entry of said order.

**COMMENT: Only two of the six constitutions used for comparative purposes have similar provisions. This section was amended in 1938 to increase the term of office for certain county officials from two to four years and add the reference to qualifications. The Council concludes that this section should be repealed.**

Section 6. The legislative assembly may provide for the election or appointment of such other county, township, precinct and municipal officers as public convenience may require and their terms of office shall be as prescribed by law, not in any case to exceed two years, except as in this constitution otherwise provided.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section should be repealed.**

Section 7. The legislative assembly may, by general or special law, provide any plan, kind, manner or form of municipal government for counties, or counties and cities and towns, or cities and towns, and whenever deemed necessary or advisable, may abolish city or town government and unite, consolidate or merge cities and towns and

county under one municipal government, and any limitations in this constitution notwithstanding, may designate the name, fix and prescribe the number, designation, terms, qualifications, method of appointment, election or removal of the officers thereof, define their duties and fix penalties for the violation thereof, and fix and define boundaries of the territory so governed, and may provide for the discontinuance of such form of government when deemed advisable; provided, however, that no form of government permitted in this section shall be adopted or discontinued until after it is submitted to the qualified electors in the territory affected and by them approved.

**COMMENT: All six constitutions used for comparative purposes have somewhat similar provisions. This section was added by amendment in 1922. The council concludes that this section is adequate.**

Section 8. Any county or counties in existence on the first day of January, 1935, under the laws of the state of Montana or which may thereafter be created or established thereunder shall not be abandoned, abolished and/or consolidated either in whole or in part or at all with any other county or counties except by a majority vote of the duly qualified electors in each county proposed to be abandoned, abolished and/or consolidated with any other county or counties expressed at a general or special election held under the laws of said state.

**COMMENT: None of the six constitutions used for comparative purposes have provisions directly comparable to the section. This section was added by amendment in 1936. The Council concludes that this section should be incorporated into Section 2 of this article.**

# Chapter XVIII
# ARTICLE XVII–PUBLIC LANDS

## Summary

The provisions of this article relate to lands the state has acquired or may acquire. The article does not deal with the subject of the capacity of the state to acquire property, but imposes limitations upon the power of the legislature to dispose of public lands. Restrictions on the disposition of public lands are found in some fifteen state constitutions.[33] These restrictions usually relate to price, amount of land to be sold, types of land sold, and purposes for which land can be sold. Provisions such as this, "which prohibit the assembly from legislating on certain subjects and those which in themselves legislate hinder the legislators in their overall function of 'policy-making and articulation.' "[34]

The Council concludes that all three sections contained in this article should be repealed. They are statutory in nature. If some reference to public lands is desirable, Section 3 could be relocated in an article on miscellaneous provisions.

## Comments on Individual Sections of Article XVII

Section 1. All lands of the state that have been, or that may hereafter be granted to the state by congress, and all lands acquired by gift or grant or devise, from any person or corporation, shall be public lands of the state, and shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised; and none of such land, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of, except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States. Said lands shall be classified by the board of land commissioners, as follows: First, lands which are valuable only for grazing purposes. Second, those which are principally valuable for the timber that is on them. Third, agricultural lands. Fourth, lands within the limits of any town or city or within three miles of such limits; provided, that any of said lands may be re-classified whenever, by reason of increased facilities for irrigation or otherwise, they shall be subject to different classification.

**COMMENT: Three of the six Constitutions used for comparative purposes have somewhat similar provisions. The Council concludes that this section is unnecessary and should be repealed.**

Section 2. The lands of the first of said classes may be sold or leased, under such rules and regulations as may be prescribed by law. The lands of the second class may be sold, or the timber thereon may be sold, under such rules and regulations as may by prescribed by law. The agricultural lands may be either sold or leased under such rules and regulations as may be prescribed by law. The lands of the fourth class shall be sold in alternate lots of not more than five acres each, and not more than one-half of any one tract of such lands shall be sold prior to the year one thousand nine hundred and ten (1910).

**COMMENT: Four of the six constitutions used for comparative purposes refer to the lease of public lands, sale of public lands, or both. The Council concludes, however, that this section is unnecessary and should be repealed.**

Section 3. All other public lands may be disposed of in such manner as may be provided by law.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions in a separate section, although references to disposal of public lands are contained in other sections. The Council concludes**

33. *Index Digest of State Constitutions*, pp. 799-803.

34. *Salient Issues of Constitutional Revision*, p. 69.

that this section should be repealed. If a reference to public lands is desirable, it could be included in an article on miscellaneous subjects.

# Chapter XIX
# ARTICLE XVIII–LABOR

## Summary

Article XVIII creates the Department of Agriculture and a Department of Labor and Industry. It establishes the maximum work day, and makes it unconstitutional to employ children under sixteen years of age in underground mines. Most state constitutions contain some provisions on labor.[35] These provisions generally set a maximum working day, create a department to administer laws releting to labor, and protect the collective bargaining process.

After a review of Aritcle XVIII, the Council concludes that this article should be repealed in its entirety. The Council concludes that this article is statutory in nature. These subjects should be regulated by legislative enactment.

## Comments on Individual Sections of Article XVIII

Section 1. The legislative assembly shall provide for a department of agriculture, and a separate department of labor and industry to be located at the capitol and each of said departments shall be under the control of a separate commissioner who shall be appointed by the governor, subject to the confirmation of the senate. Each commissioner shall hold office for four (4) years, and until his successor is appointed and qualified; the compensation of each commissioner shall be as provided by law. The powers and duties of each commissioner shall be prescribed by the legislature.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. This section was amended in 1950 to separate the Department of Agriculture and the Department of Labor and Industry. The Council concludes that this section should be repealed.**

Section 2. It shall be unlawful for the warden or other officer of any state penitentiary or reformatory institution in the state of Montana, or for any state officer to let by contract to any person or persons or corporation the labor of any convict confined within said institutions.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.**

Section 3. It shall be unlawful to employ children under the age of sixteen (16) years of age in underground mines.

**COMMENT: Only one of the six constitutions used for comparative purposes has a provision on employment of children. This section was added by amendment in 1904. The Council concludes that this section is unnecessary. It should be repealed.**

Section 4. A period of eight hours shall constitute a day's work in all industries, occupations, undertakings and employments, except farming and stock raising; provided, however, that the legislative assembly may by law reduce the number of hours constituting a day's work whenever in its opinion a reduction will better promote the general welfare, but it shall have no authority to increase the number of hours constituting a day's work beyond that herein provided.

**COMMENT: Only one of the six constitutions used for comparative purposes has a provision on the length of a working day. This section was added by amendment in 1904 and amended in 1936. The Council concludes that this section should be repealed.**

Section 5. The legislature by appropriate legislation shall provide for the enforcement of the provisions of this article.

**COMMENT: None of the six constitutions used for comparative purposes have similar provisions. This section was added by amendment in 1904. The Council concludes that this section is unnecessary and should be repealed.**

35. *Index Digest of State Constitutions*, pp. 587-594.

# Chapter XX

# ARTICLE XIX–MISCELLANEOUS SUBJECTS AND FUTURE AMENDMENTS

## Summary

This is the miscellaneous article of the Montana constitution. It prescribes the procedures and methods for calling a constitutional convention or amending the constitution; prohibits lotteries and gambling; and prohibits perpetuities except for charitable purposes. Most state constitutions contain provisions similar to those found in Article XIX.

After a review of this article, the Council concludes that four sections (1, 2, 5, and 9) are adequate, and three sections (3, 4, and 7) should be repealed because they are unnecessary. Two sections (6 and 8), should be revised as follows:

**Section 6. This section requires that county officers maintain their offices at the county seat. The Council concludes that if this section is necessary, it should be relocated in Article XVI which deals with counties and county officers.**

**Section 8. This section prescribes the method of calling a constitutional convention. Although the language of this section allows calling either a limited or unlimited constitutional convention, it should be revised to explicitly provide for a limited constitutional convention.**

## Comments on Individual Sections of Article XIX

Section 1. Members of the legislative assembly and all officers, executive, ministerial or judicial, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation, to-wit: "I do solemnly swear (or affirm) that I will support, protect and defend the constitution of the United States, and the constitution of the state of Montana, and that I will discharge the duties of my office with fidelity; and that I have not paid, or contributed, or promised to pay or contribute, either directly or indirectly, any money or other valuable thing to procure my nomination or election (or appointment) except for necessary and proper expenses expressly authorized by law; that I have not knowingly violated any election law of this state, or procured it to be done by others in my behalf; that I will not knowingly receive, directly, or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office other than the compensation allowed by law, so help me God." And no other oath, declaration or test shall be required as a qualification for any office or trust.

**COMMENT: All six constitutions used for comparative purposes contain similar provisions. The Council concludes that this section is adequate.**

Section 2. The legislative assembly shall have no power to authorize lotteries, or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state.

**COMMENT: Although only one of the six constitutions used for comparative purposes has a similar provision, the Council concludes that this section is adequate.**

Section 3. The legislative assembly shall enact suitable laws to prevent the destruction by fire from any cause of the grasses and forests upon lands of the state or upon lands of the public domain the control of which may be conferred by congress upon this state, and to otherwise protect the same.

**COMMENT: Three of the six constitutions used for comparative purposes contain sections which refer to natural resources. The Council concludes that this section is unnecessary and should be repealed.**

Section 4. The legislative assembly shall enact liberal homestead and exemption laws.

**COMMENT: Only one of the six constitutions used for comparative purposes has a somewhat similar provision. The Council concludes that this section is unnecessary and should be repealed.**

Section 5. No perpetuities shall be allowed, except for charitable purposes.

COMMENT: Although none of the six constitutions used for comparative purposes have similar provisions, the Council concludes that this section is adequate.

Section 6. All county officers shall keep their offices at the county seats of their respective counties.

COMMENT: Only one of the six constitutions used for comparative purposes has a similar provision. If this section is necessary, the Council concludes that it should be relocated in the article on local government.

Section 7. In the disposition of the public lands granted by the United States to this state, preference shall always be given to actual settlers thereon, and the legislative assembly shall provide by law for carrying this section into effect.

COMMENT: None of the six constitutions used for comparative purposes have similar provisions. The Council concludes that this section is unnecessary and should be repealed.

Section 8. The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question whether there shall be a convention to revise, alter, or amend this constitution; and if a majority of those voting on the question shall declare in favor of such convention, the legislative assembly shall at its next session provide for the calling thereof. The number of members of the convention shall be the same as that of the house of representatives, and they shall be elected in the same manner, at the same places, and in the same districts. The legislative assembly shall in the act calling the convention designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with the necessary expenses of the convention. Before proceeding, the members shall take an oath to support the constitution of the United States and of the state of Montana, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of the members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the legislative assembly. Said convention shall meet within three months after such election and prepare such revisions, alterations or amendments to the constitution as may be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect.

COMMENT: Five of the six constitutions used for comparative purposes contain similar provisions. Four constitutions require placing the question of calling a convention on the ballot if no convention has been held within a specified period (Alaska and Hawaii have a ten-year period, Michigan has a sixteen-year period, and the Model State Constitution has a fifteen-year period). Although this section allows calling a limited convention, the Council concludes that it should be revised to explicitly refer to both a limited and unlimited convention.

Section 9. Amendments to this constitution may be proposed in either house of the legislative assembly, and if the same shall be voted for by two-thirds of the members elected to each house, such proposed amendments, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals; and the secretary of state shall cause the said amendment or amendments to be published in full in at least one newspaper in each county (if such there be) for three months previous to the next general election for members to the legislative assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection and such as are approved by a majority of those voting thereon shall become part of the constitution. Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately; provided, however, that not more than three amendments to this constitution shall be submitted at the same election.

COMMENT: All six constitutions used for comparative purposes have similar provisions. A proposed amendment which would increase the maximum number of amendments submitted at a single general election from three to six will be voted upon in the 1968 general election. The Council concludes that this section is adequate.

# Chapter XXI
# ARTICLE XX–SCHEDULE

## Summary

The Council has not commented on individual sections of Article XX. This article is mechanical in nature providing for an orderly transition from territorial to state government.

## Individual Sections of Article XX Without Comments

That no inconvenience may arise by reason of changing from a territorial to a state form of government, it is declared as follows:

Section 1. All laws enacted by the legislative assembly of the territory of Montana and in force at the time the state shall be admitted into the Union and not inconsistent with this constitution or the constitution or laws of the United States of America, shall be and remain in full force as the laws of the state until altered or repealed, or until they expire by their own limitation; provided, that whenever in said laws the words "territory," "Montana territory" or "territory of Montana" occur, the words "state" or "state of Montana" shall be appropriately substituted and read therefor; and, provided further, that the duties which now by law devolve upon probate judges as jury commissioners and in relation to issuing marriage licenses and filing and recording marriage certificates, and the duties as ex-officio clerks of their own courts, shall until otherwise provided by law, devolve upon and be performed by the clerks of district courts, in their respective counties; and provided further, that the duties of probate judges now imposed by law relative to town sites and to the approval of bonds of other county officers shall, until otherwise provided by law, be performed by the district judges in the several counties in their respective districts.

Section 2. All lawful orders, judgments and decrees in civil causes, all contracts and claims, and all lawful convictions, judgments and sentences in criminal actions, made and entered, or pronounced by the courts within the territory of Montana, and in force at the time the state shall be admitted into the Union, shall continue and be and remain in full force in the state unaffected in any respect by the change from a territorial to a state form of government, and may be enforced and executed under the laws of the state.

Section 3. No crime or criminal offense committed against the laws of the territory of Montana shall abate, or be in any wise affected, by reason of the change from a territorial to a state form of government; but the same shall be deemed and taken to be an offense against the laws of the state, and the appropriate courts of the state shall have jurisdiction over and to hear and determine the same; provided, that this section shall not in any wise be construed to change the law of the statute of limitations, or the due effect or application of the same.

Section 4. Except as herein otherwise provided, the word "district" shall be substituted and read in lieu of the word "probate" in the terms "probate court" or "probate judge" whenever the same occur in the laws of the territory of Montana, and all said laws which by their terms apply to probate courts or probate judges shall, except as in this constitution otherwise provided, upon a change from territorial to state government, be deemed and taken to apply to district courts and district judges; provided, that all laws allowing fees to probate judges are hereby repealed.

Section 5. Clerks of district courts, until otherwise provided by law, shall each perform the duties and be entitled to the same fees as now provided by law for clerks of the district courts of the territory, and until otherwise provided by law shall also perform the services and be entitled to fees therefor that are now provided for clerks of probate courts.

Section 6. Upon a change from territorial to state government the seals in use by the supreme court and the territorial district courts in and for the several counties respectively, shall pass to and become, until otherwise provided by law, the seals respectively of the supreme court and of the district courts of the state in such counties.

Section 7. Prosecutions for criminal offenses against the laws of the territory of Montana, pending at the time the state shall be admitted into the Union shall not abate; but the same shall continue and be prosecuted in the name of the state of Montana, and the title of every such action shall be changed to conform to this provision.

Section 8. Parties who, at the time of the admission of the state into the Union, may be confined under lawful commitments, or otherwise lawfully held to answer for alleged violations of any of the criminal laws of the territory of Montana, shall continue to be so confined or held until discharged therefrom by the proper courts of the state.

Section 9. All writs, processes, prosecutions, actions, causes of action, defenses, claims and rights of individuals, associations and bodies corporate existing at the time the state shall be admitted into the Union, shall continue and be respectively executed, proceeded with, determined, enforced and protected under the laws of the state.

Section 10. All undertakings, bonds, obligations and recognizances in force at the time the state shall be admitted into the Union, which were executed to the territory of Montana, or any officer thereof in his official capacity, or to any official board for the benefit of the territory of Montana, are hereby respectively assigned and transferred to the state of Montana, to the state officer successor to said territorial officer, or to the official board successor to the aforesaid official board, for the use of the state, as the case may be, and shall be as valid and binding as if executed under state law to the state, or state officer in his official capacity, or official board, for the benefit of the state; and all fines, taxes, penalties and forfeitures due or owing to the territory of Montana or to any county, school district, or municipality therein, at the time the state shall be admitted into the Union, are hereby respectively assigned and transferred, and the same shall be payable to the state, county, school district or municipality, as the case may be, and payment thereof may be enforced under the laws of the state.

Section 11. All property, real and personal, and all moneys, credits, claims, demands and choses in action of every kind, belonging to the territory of Montana at the time the state shall be admitted into the Union, are hereby assigned and transferred to, and shall be vested in, and become the property of the state of Montana.

Section 12. All obligations of the territory of Montana, existing, in force and unpaid at the time of the admission of the state into the Union are hereby assumed by the state, which shall and will well and truly pay the same.

Section 13. All matters, cases and proceedings pending in any probate court in the territory of Montana, at the time the state shall be admitted into the Union, and all official records, files, moneys, and other property of, or pertaining to such court, are hereby transferred to the district court in and for the same county, and such district court shall have full power and jurisdiction to hear, determine and dispose of all such matters, cases and proceedings.

Section 14. All actions, cases and proceedings, and matters which shall be pending in the supreme and district courts of Montana territory at the time of the admission of the state into the Union whereof the United States circuit or district court might have had jurisdiction, had such court existed at the commencement of such actions, cases, proceedings and matters, respectively, shall be transferred to said United States circuit and district courts respectively; and all the files, records, indictments and proceedings relating to such actions, cases, proceedings and matters shall be transferred to said United States courts; provided, that no civil action, cause or proceeding to which the United States is not a party, shall be transferred to either of said United States courts except upon written request of one of the parties thereto and in the absence of such request, such case shall be proceeded with in the proper state courts.

Section 15. All actions, cases, proceedings and matters pending in the supreme and district courts of the territory of Montana at the time the state shall be admitted into the Union, and all files, records and indictments relating thereto, except as otherwise provided herein, shall be appropriately transferred, as may be proper to the supreme and district courts of the state, respectively, and all such actions, cases and matters shall be proceeded with in the proper state courts.

Section 16. Upon a change from a territorial to a state government, and until otherwise provided by law, the great seal of the territory shall be deemed and taken to be the great seal of the state of Montana.

Section 17. All territorial, county and township officers now occupying their respective positions under the laws of the territory of Montana, or of the United States of America, shall continue and remain in their respective official positions and perform the duties thereof as now provided by law after the state is admitted into the Union, and shall be considered state officers until their successors in office shall be duly elected and qualified, as provided by ordinance, notwithstanding any inconsistent provisions in this constitution, and shall be entitled to the same compensation for their services as is now established by law; provided, that the compensation for justices of the supreme court, governor and secretary of the territory shall be paid by the state of Montana.

# Chapter XXII
# ARTICLE XXI–MONTANA TRUST AND LEGACY FUND

## Summary

The Montana trust and legacy fund consists of the permanent school fund, the state permanent revenue fund, the permanent fund for the Montana University System, other permanent funds for the Montana University System or other state institutions originating in land grants from the United States, gifts or legacies in excess of $250 given for specific purposes, and all other state funds subject to investment as prescribed by the law. All portions of the trust and legacy fund are invested by the State Board of Land Commissioners, and the State Treasurer must keep a record of each fund filing a duplicate copy of that record with the Secretary of State. The Supreme Court has general supervisory authority over the entire administration of the fund.

Investment of the monies in the trust and legacy fund is restricted to public securities within the state, bonds of the state, United States bonds, bonds guaranteed by the United States as to principal and interest, and federal land bank bonds. In addition to these restrictions, the Legislature may further limit investments by statute. Until the funds reach specified amounts (permanent state fund $100 million, permanent school fund $500 million, and permanent revenue fund of the Montana University System $100 million), all interest income must be credited to the fund principal accounts. Thereafter, five percent of the interest income will be credited to the fund principals and the remainder will be available for state and educational expenditures. Subject to these restrictions, the legislature has authority to use all interest income for the purposes for which the funds were created "when any of the three aforesaid permanent funds become so large that no further increase is necessary or desirable . . . "

Rather than comment on individual sections contained in Article XXI, the Council has commented on the entire article. The Council concludes that this article is not adequate as presently written and should be revised in its entirety. This article was added by amendment in 1924 and further amended in 1938. None of the six constitutions used for comparative purposes have similar provisions. In 1964, the Legislative Council recommended that Section 8, which specifies how monies may be invested, be repealed. Commenting on the Council proposal, the Commissioner of Lands and Investments in his biennial report for the period 1964-1966 stated:

> **The Constitutional restrictions placed upon investments for the Montana Trust and Legacy Fund should be removed. As a result of these restrictions, the fund has actually failed to grow in purchasing power as it should have. Admittedly, funds invested in Government securities are fully guaranteed and funds invested in equities are not; however, our economy has made an impressive demonstration of its ability to weather unstabilizing events over the past thirty years. Furthermore, it should be pointed out that downward trends in the market are not as serious for institutional funds such as the Trust and Legacy, in view of its long term nature, as the same type of activity creates with the private investor.**
>
> **At the time the Constitution was written, investments in the business community were viewed with some misgiving and Government securities were looked upon as the only properly safe investment for sacred trust funds. Experience in the past few decades has demonstrated the fallacy of this assumption when we find the fund growing but the beneficiaries receiving less than they might in constant dollars of purchasing power. Due to these limitations the Trust and Legacy Fund has been unable to even achieve the rate of return on investments that other State funds have. The Retirement Funds, for example, in their experience with Government guaranteed mortgages and corporate utility bonds have shown that some broadened authority, even without investing in equities, allows for diversification and provides the fund manager alternative investment opportunities which can increase the return.**
>
> **A proposal was made before the last session of the Legislature to submit to the electors of the State an amendment to Section 3, Article XI, and the repeal of Section 8, Article XXI, of the Constitution in order to allow broadened investment authority to be set by law. Although this failed to gain favorable consideration by the Assembly, it is suggested that the matter be reconsidered by the Fortieth Legislative Session. It is also**

suggested that upon favorable action by the Legislature and the electors, action be taken by the Legislature, in session at that time setting forth investment criteria and providing for effective administration.[36]

Although the Council concurs in the above statement, the issue of investment restrictions could be separated from the question of adequacy of Article XXI. The Council suggests that Article XXI be revised substantially as follows leaving investment restrictions to be fixed by law.

Section 1. (1) The Montana trust and legacy fund consists of:

(a) the permanent school fund;

(b) the state permanent fund;

(c) the permanent fund for the Montana University System;

(d) other permanent funds originating in land grants from the United States for institutions of higher learning and other state institutions;

(e) gifts, donations, grants, and legacies of not less than two hundred fifty dollars ($250) each to the permanent school fund, state permament fund, permanent fund for the Montana University System, and for the benefit of scientific, education, benevolent, and charitable work;

(f) all other funds in the custody of a state officer or agency that the legislative assembly may prescribe;

(g) sinking funds, permanent funds, cumulative funds, and trust funds belonging to, or in custody of, any political subdivision of the state upon request of the governing body of the political subdivision.

(2) Gifts, donations, grants, and legacies shall be administered as directed by the donor. If the donor does not direct, administration shall be as provided by law.

(3) The state treasurer shall keep the Montana trust and legacy fund separate and shall keep a permanent record of all gifts, donations, grants, and legacies, showing the names of the donors and purpose of the contribution. The secretary of state shall keep a duplicate of this record.

**COMMENT: Combination and revision of Sections 1, 2, 4, 6 and 7. The last two sentences of Section 4 and the last two sentences of Section 6 were deleted. The last sentence of subsection (2) added.**

Section 2. (1) The state board of land commissioners shall invest these separate funds as one common fund known as the Montana trust and legacy fund. The board shall convert non-cash contributions to cash as soon as practicable.

(2) Investments of trust and legacy funds shall be made as prescribed by law.

**COMMENT: Combination and revision of Sections 5 and 8. The last sentence of Section 8 was deleted. Investments restrictions were removed.**

Section 3. (1) The interest income shall be apportioned by the state treasurer according to the average amount of each fund in the Montana trust and legacy fund.

(2) Except as provided in Section 4 of this article, all net earnings shall be added to the fund principals until the funds reach the amounts specified by this section and the funds shall then be used in the following manner;

(a) After the state permanent fund reaches one hundred million dollars ($100,000,000), five percent (5%) of the net earnings shall be added to the fund principal and ninety-five percent (95%) shall be used for general state expenses.

(b) After the permanent school fund reaches five hundred million dollars ($500,000,000) five percent (5%) of the net earnings shall be added to the fund principal and ninety-five (95%) shall be apportioned to the school districts for educational purposes as prescribed by law on the basis of aggregate school attendance of persons six (6) years of age but less than nineteen (19) years of age in each district during the preceding school year.

36. Department of State Lands and Investments, *Biennial Report For the Period Beginning July 1, 1964 to June 30, 1966*, p. 11.

(c) After the permanent fund for the Montana university system reaches one hundred million dollars ($100,000,000), five percent (5%) of the net earnings shall be added to the fund principal and ninety-five percent (95%) shall be apportioned for uses prescribed by law to the university units on the basis of attendance during the preceding school year.

**COMMENT: Combination and revision of Sections 9, 12, 13 and 14.**

Section 4. (1) Whenever the purpose for which a contribution was made has been attained, or can no longer be ascertained, it shall be transferred to the permanent school fund. All contributions without a specified purpose shall be credited to the permanent school fund.

(2) When any permanent fund becomes so large that no increase is necessary or desirable, the legislative assembly may use all net income for the purpose for which the fund was created, or it may use five percent (5%) of the net income to create other permanent fund or for any other public purpose.

**COMMENT: Combination and revision of Sections 15 and 16.**

Section 5. The justices of the supreme court of the state are a supervisory board and have authority over the entire administration of the fund. This board may reject any contribution that it deems unwise.

**COMMENT: Combination and revision of Section 17 and the last clause of Section 3. Sections 3 (except the last clause), 10, 11 and 18 have been deleted.**

## Individual Sections of Article XXI Without Comments

Section 1. The state of Montana does hereby agree and covenant to accept from any natural person, or persons, from inside or outside the state, gifts, donations, grants and legacies in any amount or value not less than two hundred fifty ($250.00) dollars each, for the creation of a state permanent revenue fund, for the creation of a state permanent school fund, for the creation of a permanent revenue fund for the university of Montana, and for the benefit of scientific, educational, benevolent and charitable work, subject, however, to all the provisions and limitations of this article.

Section 2. The state further agrees and covenants to hold in trust all such contributions (gifts, donations, grants and legacies), to administer the same perpetually, and to apply the net earnings thereof as therein directed, subject, however, to the provisions and limitations of this act.

Section 3. The original amounts of all contributions for the state permanent revenue fund, for the state permanent school fund, and for the permanent revenue fund for the university of Montana, shall be added to such funds respectively and become inseparable and inviolable parts thereof. Contributions for other objects may contain a provision to the effect that the net earnings thereof, or part of the net earnings, shall be added to the principal for a certain length of time, or until it has reached a certain amount, or until the happening of a certain event, but such contingent event shall not be more remote than permitted by the laws effecting perpetuities; but no contribution containing such provision as to accumulation shall be accepted by the state until it has been approved by the supervisory board hereinafter constituted, which board shall have power to reject any such contribution that it may deem unwise.

Section 4. The state treasurer shall keep a permanent record of all such gifts, donations, grants and legacies, showing the names of the givers, the purpose of the contribution, and other essential facts relating thereto. A duplicate of this record shall be kept by the secretary of state. These records shall be preserved perpetually as a lasting memorial to the givers and their interest in society. The legislative assembly shall from time to time make provision for suitable publicity concerning these benefactors of their fellowmen.

Section 5. The same state board and officers that have charge of the investment and administration of the public school fund of the state shall have charge of the investment and administration of all the funds administered under this article. All these funds shall be invested as one common fund to be known and designated as the Montana trust and legacy fund. In case any contribution is in some other form than cash, such board shall convert it into cash as soon as practicable.

Section 6. The public school permanent fund, the other permanent funds originating in land grants from the United States for the support of higher institutions of learning, and for other state institutions, subject to investment, shall

be invested as parts of the Montana trust and legacy fund; so also all other funds in the custody of any officer or officers of the state, subject to investment, that the legislative assembly may prescribe. The separate existence and identity of each and every fund invested and administered as a part of the Montana trust and legacy fund shall be strictly maintained.

All investments belonging to the public school permanent fund, except investments in state farm mortgage loans, and all investments belonging to the said land grant funds, shall be transferred to the Montana trust and legacy fund at the full amounts of the unpaid balances of such investments.

Section 7. The state shall accept for investment and administration as parts of the Montana trust and legacy fund, sinking funds, permanent funds, cumulative funds and trust funds belonging to or in the custody of any of the political subdivisions of the state when requested to do so by the governing board of such political subdivision, subject, however, to such limitations as the legislative assembly may prescribe. The legislative assembly may provide for the investment and administration as a part of the Montana trust and legacy fund of any other fund subject to its power.

Section 8. The Montana trust and legacy fund shall be safely and conservatively invested in public securities within the state, as far as possible, including school district, county and minicipal bonds, and bonds of the state of Montana; but it may also be partly invested in bonds of the United States, bonds fully guaranteed by the United States as to principal and interest, and federal land bank bonds. All investments shall be limited to safe loan investments bearing a fixed rate of interest. In making long term investments preference shall be given to securities payable on the amortization plan or serially. The legislative assembly may provide additional regulations and limitations for all investments from the Montana trust and legacy fund.

All existing constitutional guarantees against loss or diversion applying to the public school fund, to the funds of the state university and to the funds of all other state institutions of learning, shall remain in full force and effect.

Section 9. On the last day of March, of June, of September and of December of each year, the state treasurer shall apportion all interest collected for the Montana trust and legacy fund during the three month period then terminating to all the separate and integral funds which constitute such fund on the day of such apportionment and which constituted parts of the fund on the first day of the three month period then terminating. The basis of apportionment shall be the average amount of each such fund between the first day and the last day of the three month period.

Section 10. The state treasurer shall keep all deposits of money belonging to the Montana trust and legacy fund separate and distinct from other deposits of money in his keeping.

Section 11. All money in any of the separate and integral funds constituting the Montana trust and legacy fund and the interest apportioned therefrom, shall be subject to payment to the person, institution or other entity entitled thereto, without appropriation by the legislative assembly, upon proper authorization as provided by law.

Section 12. All the net earnings accruing to the state permanent revenue fund shall annually be added thereto until it has reached the sum of one hundred million dollars ($100,000,000.00). Thereafter only one twentieth of the annual net earnings shall be added to the fund itself, and the remaining nineteen twentieths of the net earnings shall be used for the general expenses of the state.

Section 13. All the net earnings accruing to the state permanent school fund shall annually be added thereto until it has reached the sum of five hundred million dollars ($500,000,000.00). Thereafter only one twentieth of the annual net earnings shall be added to the fund itself, and the remaining nineteen twentieths shall annually be apportioned to the school districts of the state on the basis of the aggregate actual school attendance in each district during the preceding school or calendar year by persons between the ages of six and eighteen years and shall be used exclusively for educational purposes, subject to such regulations and limitations as may be prescribed by law.

Section 14. All the net earnings accruing to the permanent revenue fund for the university of Montana shall annually be added thereto until it has reached the sum of one hundred million dollars ($100,000,000.00). Thereafter only one twentieth of the annual net earnings shall be added to the fund itself, and the remaining nineteen twentieths shall be apportioned to all the educational institutions then comprising the university of

Montana, on the basis of the aggregate actual attendance in each institution during the preceding school or calendar year, and may be used for all purposes properly connected with the work of these institutions, subject, however, to such regulations and limitations as may be prescribed by law.

Section 15. Whenever the purpose for which a certain contribution was made has been accomplished, or can no longer be ascertained or followed, then the total amount of such fund shall be transferred to the state permanent school fund and become a permanent and inviolate part thereof. All contributions without a specified purpose shall be credited to the state permanent school fund.

Section 16. Should the time ever come when any of the three aforesaid permanent funds become so large that no further increase is necessary or desirable, then, in such case, the legislative assembly shall have power to provide for the use of all of the net income from such fund for the purpose for which it was created, or it may use the one twentieth of the annual net income which was to be added to the fund itself for the creation of other permanent revenue funds, or for any other public purpose that it may deem wise; provided, however, that none of the foregoing provisions of this section shall apply to any of these funds until it has reached the specific amount fixed by this article.

Section 17. The justices of the supreme court of the state of Montana are hereby made and constituted a supervisory board over the entire administration of all the funds created or authorized by this article and the income therefrom. During January of each year, this board shall review the administration for the preceding year. It shall decide all uncertain or disputed points arising in the administration of the funds whenever requested to do so by a beneficiary, by a state official charged with some part of the administration of the fund, or any other interested party; and it may do so upon its own initiative. It shall be the duty of the supervisory board to do and perform all acts and things that it may deem necessary in order to cause the board and officers having direct charge of these funds to administer the same carefully and wisely in full compliance with the provisions of this article and such further legislation as may be enacted relating thereto. The clerk of the supreme court shall be ex-officio clerk of this supervisory board.

Section 18. The legislative assembly shall from time to time enact such further legislation as it may deem necessary to carry into effect the provisions of this article.

# Chapter XXIII
# CONCLUSIONS, METHODS OF CHANGE, AND RECOMMENDATIONS

## Conclusions

Excluding the schedule (Article XX), which is a purely mechanical article included to provide an orderly transition when the Constitution was adopted in 1889, the present Montana Constitution contains 262 sections in 20 substantive articles. The Council concludes that 124 sections (48 percent) are adequate as presently written. At least 6 of these sections, however, may be unnecessary and some of the remaining 118 sections could be improved even though generally adequate. In addition, 53 sections (20 percent) should be revised, and 85 sections (32 percent) should be repealed. Some of these should be replaced by statute. Included in the portions which should be repealed are 4 entire articles of the present document.

Even given the conclusion that less than one-half of the provisions in the Montana Constitution are adequate indicating the need for improvement, however, a central issue remains: What kind of state government should constitutional reform promote and support? It has been said that more specifically the question can be stated: "Is the constitution to be changed to provide a legal underpinning for active, dynamic government or is it to be changed mainly to curb governmental activity and control the exercise of the powers of government."[37] The answer to this question will depend upon many factors including basic philosophy of government, the place of the states in the federal system, and the viability of state government to respond effectively to the vital issues of public policy.[38]

Although all three factors cited above are important, recent developments have focused attention on the place of the states in the federal system. In recent times there has been steady erosion of state authority. Unless action is taken soon, the viability of the states may be critically impaired by the deteriorating position of state government in our federal system. The Committee for Economic Development stated:

> **This Committee finds the choice to be clear: laggard state governments must be renovated in far-reaching ways, or their policy and functional roles will tend to wither away. We believe the states should meet their responsibilities for the urgent needs of a fast-changing social order, within the application of the time-honored doctrine of federalism. But without thoroughgoing revision of archaic constitutions and sweeping modernization of governmental institutions, burdens will be thrust upon national and local governments that neither is well suited to bear.** [39]

To implement this conclusion, the Committee included as its first recommendation:

1. *State constitutional revision should have highest priority in restructuring state governments to meet modern needs. Stress should be placed on repealing limitations that prevent constructive legislative and executive action, on clarifying the roles and relationships of the three branches of government, on permitting thorough modernization of local government in both rural and urban areas, and on eliminating matters more appropriate for legislative and executive action.*

   > **Ideally, a constitution is a statement of basic principles, outlining powers, relationships, and responsibilities. It should not be encumbered with a vast bulk of ordinary statute law as so many state constitutions now are. Appropriate inclusions are a bill of rights, voting qualifications, provisions concerning political parties and elections, relationships between state and local governments, broad structural patterns for each of the three branches of government, the scope of gubernatorial authority in legislation and administration, and the means of amendment. Most, if not all, other matters are properly extraneous to this document.**[40]

The Council concurs in the general conclusion, the recommendation, and the statement regarding the content of a

37. *Salient Issues of Constitutional Revision*, p. 165.
38. *Ibid.*
39. Committee for Economic Development, *Modernizing State Government*, Reprint of Chapter 1, July, 1967, p. 18.
40. *Ibid.*, pp. 15-16.

state constitution. The question of whether the Montana Constitution should be changed, therefore, must be answered in the affirmative. The changes should be aimed at providing the basis for active, dynamic government.

## Methods of Change

Unlike fourteen of the states, Montana does not allow change of the constitution through an initiated measure. The methods of change permitted in Montana are:

1. *Piecemeal amendment.* Article XIX, Section 9 permits the Legislative Assembly to submit to the people not more than three amendments at each general election. In 1968 a proposed amendment to increase the number from three to six amendments at a single general election will be voted upon. Proposed amendments must be approved in each house of the legislature by two-thirds of the members elected to that house. Amendments are than published by the Secretary of State in at least one newspaper in each county for three months prior to the election and placed on the general election ballot.
2. *Constitutional convention.* Article XIX, Section 8 permits the Legislative Assembly to submit to the voters the question of whether or not there shall be a convention to revise, alter, or amend the constitution. This has never been done.
3. *Limited constitutional convention.* Article XIX, Section 8 provides that a constitutional convention shall "prepare such revisions, alterations or amendments to the constitution as may be deemed necessary . . . " Courts in several other states where constitutions contain similar language have held that the subject matter to be considered by the convention may be limited by the authorizing legislation, subject to approval by the people. The Attorney General believes that a limited convention could be called in Montana.[41]

Since 1889, the only method used to change the Montana Constitution has been by piecemeal amendment. Recognizing that three amendments have not been submitted to the voters at each general election since statehood, the three amendment provision places a serious limitation on change. The limitation, however, may not be as serious as it appears on cursory examination. While it is true that only three subjects can be voted upon at each general election, the subjects contained in proposed amendments might be very broad. The Supreme Court has held that "if, in the light of common sense, the propositions have to do with different subjects so essentially unrelated that their association is artificial, they are not one, but if they may be logically viewed as parts or aspects of a single plan, the above constitutional requirement is met in their submission as one amendment."[42] The court has also said that: "Where an amendment to the constitution has but one object in view and relates to but a single plan or purpose, the fact that it may impinge upon or affect various of its provisions does not alone render it objectionable . . . "[43] These statements, of course, do not provide a finite measure of what is a single object. Yet, a constitutional authority in Montana believes that the entire judicial article could be amended by a single proposal. If a general revision of the judicial article and all sections of the document affected by provisions of that article were a single subject for purposes of amendment, the three amendment limitation is not as serious as some believe. Moreover, the limitation will be eased substantially if the proposal to increase the limit to six amendments each election is accepted. Perhaps more important, in practice most amendments in Montana have been restricted to rather narrow subjects. Legislative and public opinion are not oriented toward broad amendments even though they might be a single subject thus meeting constitutional requirements.

Although amendment is the most common method used by the states for constitutional changes at a moderate pace, it does not permit the simultaneous and coordinated revision of a constitution. It is inexpensive as compared with the convention and initiative and requires no elaborate planning or preparation, but it also has several serious disadvantages. First, legislators are not chosen for their views on constitutional change and are preoccupied with proposed statutory changes during legislative sessions. Legislatures find it particularly difficult to give objective consideration to changes which affect their own structure or position within government. Legislative participation in the process of change often appears better suited to rather restrictive adjustments in constitutional provisions than to extensive changes in the entire document.[44]

41. Letter from the Attorney General on file in the Council offices.
42. *State ex rel. Hay v. Alderson*, 49 Mont. 387.
43. *State ex rel. Corry v. Cooney et al.*, 70 Mont. 355.
44. *Salient Issues of Constitutional Revision*, pp. 54-55.

A second method of modernizing the constitution is through a constitutional convention. As noted above, the convention could be unlimited or restricted to particular subjects. Obviously, a convention procedure would allow a simultaneous and coordinated revision of the entire document. It might also be expensive compared with the amendment approach to change. Persons have asserted, however, that a convention is superior to the amendment procedure for a number of reasons including: (1) greater prestige is associated with service in the convention than with service in the legislature; (2) legislative sessions are routine but a convention might be held only once in a lifetime; and (3) the high sense of mission associated with the convention and its short duration motivates many capable individuals to run as delegates who would not care to seek legislative or other elective offices. Assigning higher merit to the convention suggests that party and factional lines are reduced, and the convention is said to be less susceptible to influences of lobbyists because of the higher caliber of delegates. Moreover, since the convention delegates to not have to stand for re-election, the primary motivation for yielding to pressure is removed. Because the convention's proceedings will receive more publicity, it is also asserted that even delegates who might not desire to do so are forced to act in a more responsible manner.[45]

As an auxiliary to either piecemeal amendment or a convention (which may or may not be limited), a constitutional commission can be used. Usually, the commission has its origin in a legislative act or resolution. In 1967, three proposals to create a constitutional commission were considered in Montana and rejected. A variation is for the governor, on his own authority, to appoint a commission. In 1942 a commission was created in this manner in Michigan. Or, in some states the legislature may act without reference to the governor. This procedure was followed in California in 1947. Proponents of an appointive commission cite a number of advantages to this approach.[46]

1. Establishment of a commission is more feasible than calling a convention because the legislature will have to clear the proposals before they are submitted to the people.
2. The commission is inexpensive.
3. It is small, permitting informal discussion and thorough deliberation.
4. Experts and outstanding public and private leaders of the state can be selected without being forced to seek election to a constitutional convention.
5. The commission is not so susceptible to political pressures and to logrolling as is a convention.
6. It can work more expeditiously than a convention.
7. It can study more effectively the experiences of other states.
8. Since continuous sessions are not held, the commission has greater opportunity to reflect on its problems.
9. The final product of the commission is superior to that of a convention.

In weighing the questions of what should be done and what can be done, the general obstacles to constitutional revision must also be considered. There is a tendency on the part of individuals and groups who feel they have special status or protection under the existing constitution to oppose change. This opposition might be pronounced if changes are proposed in basic provisions such as taxation, earmarking of revenue, or the exercise of the state's regulatory powers. In addition, political leadership of a state is generally hesitant to lend full support to revision. Many leaders prefer to bear existing ills rather than experiment with innovations through change.[47]

Certain psychological obstacles to constitutional change also exist. People tend to display a romantic, often almost reverent attitude, toward a state constitution. Moreover, the public is often apathetic about change in the constitution. Problems inherent in a constitution seldom evoke the interest and enthusiasm that campaigns of public officials generate. This apathy on the part of the public strengthens the weight of special interests which oppose constitutional change. If a general revision were proposed, the cumulative vote of groups dissatisfied with specific sections could prevent adoption of an entirely new document.[48]

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45. Tip H. Allen, Jr. and Coleman B. Ransone, Jr., *Constitutional Revision in Theory and Practice* (Birmingham, Alabama: Commercial Printing Company, Inc., 1962), pp. 10-11.
46. See also, *Constitutional Revision in Theory and Practice* and Bennet M. Rich, "Convention or Commission?" *National Municipal Review*, XXXVII (March, 1948), p. 133.
47. *Constitutional Revision in Theory and Practice*, pp. 16-20.
48. *Ibid.*

There are also legal barriers to constitutional revision. In Montana, for example, a proposed amendment requires approval by two-thirds of the members elected to each house of the legislature and subsequent ratification by a majority of voters at a general election. Montana also has a limitation on the number of amendments that can be voted upon at a single election. And, the possibility of litigation over a revised constitution causes general apprehension regarding general revision.

In summary, there is no "best" approach to constitutional change. Each method outlined above has advantages and disadvantages. Each must be considered within the context of what general objectives proposed changes seek to accomplish. Nor can the approach used by another state be adapted to Montana without careful consideration.

## Recommendations

This study has led to the general conclusion that there is need for substantial revision and improvement in the Montana constitution. Provisions which invite subterfuge, provisions which are archaic, provisions which are ambiguous, provisions which are statutory, and provisions which place serious limitations on effective state government were found throughout the Montana constitution. The changes needed in the Montana constitution cannot be accomplished adequately through the present amendment process. This process encourages "nitpicking" and at the same time avoids confrontation with the basic problems of reform and change.

To resolve deficiencies and improve the present constitution, the Council recommends that the Forty-First Legislative Assembly establish a Constitution Revision Commission. A final decision on the membership of the Commission should be made by the Legislative Assembly, but the Council suggests that it could be composed of 8 legislators appointed in the same manner as members of the Legislative Council, 4 members appointed by the Governor, and 4 members appointed by the Supreme Court. The Commission should be evenly balanced politically, and consideration should be given to economic, geographic, and other pertinent factors in the selection of members. The formal training, experience, and interests of members should be as broad as possible.

This Commission should be charged to perform a detailed study of the Montana constitution, compile comprehensive information on the application and effect of its provisions, and prepare a written report containing examples of these constitutional provisions which seriously hamper effective government. The report should also contain recommendations for improvements in the present document. If the Commission determines that the most feasible method of correcting deficiencies and improving the present document is through a constitutional convention, it should include a recommended draft of a new constitution and detailed suggestions on the most feasible procedure for implementing that document. Legislation to establish such a Commission is shown in the Appendix to this report.

The Council also concludes that establishing this Comission without adequate staff and financing would be a futile effort and a disservice to the state of Montana. The Council, therefore, recommends that the Forty-First Legislative Assembly provide for strong staff support to the Commission and adequate funds for the conduct of this study.

# APPENDIX

## APPENDIX

_____ BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT TO ESTABLISH THE MONTANA CONSTITUTION REVISION COMMISSION TO STUDY THE MONTANA CONSTITUTION."

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA:

Section 1. (1) A temporary state agency known as the Montana constitution revision commission consisting of sixteen (16) members is hereby created to study the Montana constitution. Members of the commission shall be appointed for two (2) year terms beginning April 1, 1969, consideration being given to geographic, economic, and other pertinent factors, as follows:

(a) four (4) members of the house of representatives appointed by the speaker, no more than two (2) of whom shall be affiliated with the same political party;

(b) four (4) members of the senate appointed by the committee on committees, no more than two (2) of whom shall be affiliated with the same political party;

(c) four (4) members appointed by the governor, no more than two (2) of whom shall be affiliated with the same political party;

(d) four (4) members appointed by the supreme court, no more than two (2) of whom shall be affiliated with the same political party.

(2) Commission members who are not government employees or elective officials shall be reimbursed for actual and necessary expenses incurred as commission members. However, the term "elective officials," as used in this subsection, excludes members of the legislative assembly.

Section 2. (1) The commission shall conduct a detailed study of the Montana constitution, compile factual data on whether the constitution impairs effective state government, compare the Montana constitution with those of other states, and publish a written report to the forty-second legislative assembly prior to September 1, 1970. The report shall contain the findings of the commission, recommendations, a draft of any proposals for change in the Montana constitution, and recommendations of the most feasible and desirable method of implementing any proposals for change.

(2) The commission may publish progress and other reports during its study and disseminate information on the constitution as deemed desirable. Upon request, commission members shall meet with the legislative council, governor, and supreme court to report progress on the study.

Section 3. (1) The commission shall elect a chairman and other necessary officers, and shall establish its own rules relating to procedures, meetings, and quorums.

(2) The commission shall maintain a written record of its proceedings and its finances which shall be open to inspection by any person at the office of the commission during regular office hours.

(3) The commission may employ any necessary staff, assign their duties, and fix their compensation. Staff appointed shall serve at the pleasure of the commission.

(4) The commission may retain special consultants, appoint advisory groups, and consult with or request assistance from any state agency, private group, or individual deemed desirable.

(5) Upon request, state agencies shall cooperate with the commission by furnishing assistance and data to the extent possible.

Section 4. The commission may accept and expend any federal or private funds which may be available for support of the study.

Section 5. This act is effective on its passage and approval.